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In The

Supreme Court of the United States

October Term, 1996

JAY LEE GATES, JOHN RONALD BERTRAM,

Petitioners,

v.

RON SHINN; JAMES ROWLAND; NADIM KHOURY, M.D., Assistant Deputy Director – CDC Health Services; KENNETH SHEPARD, Chief Deputy Warden for CMF Clinical; NICHOLAS POULOS, M.D., DANIEL E. THOR, Chief Physician and Surgeon, CMF; PAUL MORENTZ, Chief Psychiatrist – CMF Outpatient Program; H MD; BRUCE BAKER; A R MD, Chief Psychiatrist Northern Reception Center; D. MICHAEL O'CONNOR; DOUGLAS G. ARNOLD, Acting Director of the California Department of Mental Health; CLYDE MURREY, Acting Deputy Director for State Hospitals; SYLVIA R.N., Executive Director DMH Vacaville Psychiatric Program; EDDIE YLST,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In 1989, the parties entered into a Consent Decree to resolve an enormously complex class action lawsuit over mental health care in the California state prison hospital at Vacaville. Among other things, the Decree requires defendants to provide "appropriate psychiatric evaluation and treatment . . . as medically indicated," and establishes a mediation process for resolving disagreements about implementing that requirement. Defendants never sought clarification or modification of the Decree and, in 1995, the Ninth Circuit specifically held that the "appropriate psychiatric evaluation" standard in the Decree is not ambiguous and is fully enforceable.

The district court found that defendants intentionally violated the Decree over a period of several years, including refusing to participate in good faith in the mediation process, and that members of the class "suffered and died" as a result. Defendants made no factual showing that their conduct satisfied any possible interpretation of the Decree. Nevertheless, on appeal from the district court's judgment of contempt, another Ninth Circuit panel held the Decree ambiguous and beyond the district court's power to enforce. The questions are:

1. *Did the Ninth Circuit correctly hold — in conflict with decisions of the Sixth and Eleventh Circuits — that a district court does not have power to enforce a consent decree embodying a flexible mechanism for achieving compliance, and to reject defendants' "ambiguity" defense, even though defendants willfully violated the decree for years without claiming it needed clarification?*

2. *Should the doctrine of the law of the case be mandatory, as it is in the Third and Fifth Circuits, or discretionary, as it is in the Ninth Circuit?*

PARTIES TO THE PROCEEDINGS BELOW

The Petitioners (Plaintiffs-Appellees in the Ninth Circuit) are Jay Lee Gates and John Ronald Bertram, on behalf of a class of prisoners confined to the California Medical Facility ("CMF"), a state prison located in Vacaville, California.

The Respondents (Defendants-Appellants in the Ninth Circuit) are various administrators and public officials of the California Medical Facility, the California Department of Corrections, and the California Department of Mental Health. All respondents are employees of the State of California.

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OCTOBER TERM, 1996

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RON SHINN; JAMES ROWLAND; NADIM KHOURY, M.D., Assistant Deputy Director - CDC Health Services; KENNETH SHEPARD, Chief Deputy Warden for CMF Clinical; NICHOLAS POULOS, M.D., DANIEL E. THOR, Chief Physician and Surgeon, CMF; PAUL MORENTZ, Chief Psychiatrist - CMF Outpatient Program; H MD; BRUCE BAKER; A R MD, Chief Psychiatrist Northern Reception Center; D. MICHAEL O'CONNOR; DOUGLAS G. ARNOLD, Acting Director of the California Department of Mental Health; CLYDE MURREY, Acting Deputy Director for State Hospitals; SYLVIA R.N., Executive Director DMH Vacaville Psychiatric Program; EDDIE YLST,

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit, as amended, is reported as *Gates v. Shinn*, 98 F.3d 463 (9th Cir. 1996), and can also be found at Appendix 1-24.

A copy of the Court of Appeal's December 6, 1996 Order denying plaintiffs' Petition for Rehearing and Suggestion of Rehearing *En Banc* is attached hereto at Appendix 25-26.

The District Court's October 27, 1994 Order granting Plaintiff's (Petitioner's) motion for contempt is not reported. A copy of the Order is attached hereto as Appendix 27-69.

A copy of the governing Consent Decree in this case is attached hereto at Appendix 70-114.

A copy of the March 8, 1990 District Court Order approving the Consent Decree is attached hereto as Appendix 115-117.

There have been three other reported Ninth Circuit Opinions arising from the district court proceedings in this case rendered prior to the opinion from which review is sought, each of which substantially affirmed the district court's interpretation of the Consent Decree below. See *Gates v. Deukmejian*, 987 F.2d 1392 (9th Cir. 1992); *Gates v. Rowland*, 39 F.3d 1439 (9th Cir. 1994); *Gates v. Gomez*, 60 F.3d 525 (9th Cir. 1995).

JURISDICTION

Petitioner invokes this Court's *certiorari* jurisdiction under 28 U.S.C. § 1254(1). The Denial of the Petition for Rehearing and Suggestion of Rehearing *En Banc* occurred on December 6, 1996. On February 20, 1997, Petitioners made a request for a 30-day extension of time in which to file this Petition. The request for a 30-day extension was granted by Justice O'Connor on February 21, 1997, extending the time for the application "to and including April 5, 1997." By operation of law, see Supreme Court Rule 30(1), because April 5th is a Saturday, the Petition is due on April 7, 1997.

RELEVANT PROVISIONS

The full text of the Consent Decree in this case, which was approved and adopted by the District Court on March 8, 1990, can be found at Appendix 70-114.

STATEMENT OF THE CASE

The Consent Decree and its Enforcement Process

Petitioners Jay Lee Gates and Ronald Bertram ("Plaintiffs" or "Petitioners") represent a class of prisoners housed at the California Medical Facility ("CMF"), a state prison hospital in Vacaville, California. In 1987, the prisoners filed this lawsuit pursuant to 42 U.S.C. § 1983 (later amending to include claims under the Rehabilitation Act of 1973, 29 U.S.C. § 794), alleging unconstitutionally inhumane living conditions, deliberate indifference to serious medical and psychological needs, and discrimination against disabled inmates. (Ninth Circuit Excerpt of Record ["ER"] 324.)

In the fall of 1989, after three months of trial, the parties negotiated a settlement. The terms of the settlement were set forth in a Consent Decree. (ER 324.) After notice to the class and a fairness hearing, the district court adopted the Consent Decree as its judgment on March 8, 1990. (ER 524; Civil Docket No. ["CD"] 323.) A copy of the Consent Decree can be found at Appendix 70-114.

The Consent Decree requires improvements in the treatment of specified medical conditions, enhancements in general prison conditions, a test program integrating HIV-positive inmates into general population housing units, augmentation of the inpatient psychiatric care provided by the Department of Mental Health at CMF, and a comprehensive program providing outpatient psychiatric treatment to CMF's mentally ill inmates. It also includes a specific Alternative Dispute Resolution and attorneys' fees provisions. (App. 70-114.)

Given the size of the institution and the complex remedial goals of the parties, it is not surprising that the Consent Decree defers many of the details of implementation to future plans. (See App. 79, § IV.1 and § IV.3; App. 83, § V.A.3 & V.A.4.; App. 84-85, § V.B.3. & V.C.; App. 90, § V.F.5; App. 91-93, § V.G.3.; App. 95, § VI.5.; App. 96, § VII.B.; App. 99-100, § VII.F.; App. 101, § VII.J.) The improvement of substandard medical care at a prison hospital is necessarily a complex task requiring attention to thousands of details. See Note, *Implementation Problems in Institutional Reform Cases* 91 Harv. Law Review 428, 432 (1977) ("the complexity of large organizations is . . . an important factor in the difficulty of implementing change").

The Consent Decree is an organic document that is responsive to this complex backdrop. Many sections provide that issues will be resolved through further study,

through the hiring of outside experts to evaluate programs, or through future negotiation and mediation. (See subsections listed in previous paragraph, supra.) The Consent Decree includes an alternative dispute resolution ("ADR") process. (App. 102-109.) This ADR process employs a "Mediator" to meet with the parties and resolve disputes. (App. 105-109.)

The Defendants nominated and lobbied Allen Breed, a nationally renowned expert in corrections and a former California prison administrator, to serve as the Mediator. (App. 65.) His appointment was approved by the district court on March 30, 1990. (ER 525; CD No. 334.) Mr. Breed has been and continues to serve as the only Mediator in this case. (App. 65, ER 525-605.)

The Consent Decree establishes his role: "to work with the parties to resolve disagreements through mediation, but also [] to make findings and recommendations in a report to the district court on those matters that are not resolved through mediation." *Gates v. Rowland*, 39 F.3d 1439, 1443 (9th Cir. 1994); see App. 105-106, § IX.2. The Consent Decree also gives the Mediator the power to "work with the parties to develop plans of implementation or reports required by the provisions of this Consent Decree," and "to resolve disagreements over the adequacy of plans of implementation or reports that defendants are required to prepare." (App. 106.) Defendants bargained for this process and insisted on its inclusion in the ultimate Decree. (CD 1318.)

One aspect of the Mediator's role is to fill gaps in the Consent Decree where the parties were unable to agree on specific plans or procedures at the time of settlement. (See App. 106, § IX.2.b.) As to such plans or procedures, the parties provided that defendants would draft plans in the future and submit them to the ADR system. (App.

107, §§ IX.4 and IX.5.) Even in the absence of a dispute, the Consent Decree calls for the submission of most remedial plans to the Mediator and charges the Mediator or the Mediation process with judging their suitability. (See App. 79, § IV.1 and § IV.3; App. 83, § V.A.3 & V.A.4.; App. 84-85, § V.B.3. & V.C.; App. 90, § V.F.5; App. 91-93, § V.G.3.; App. 95, § VI.5.; App. 96, § VII.B.; App. 99-100, § VII.F.; App. 101, § VII.J.)

The Psychiatric Care Provision at Issue Here

This appeal is concerned with § V.F. of the Consent Decree, which covers outpatient psychiatric care. (See App. 87-90.) In § V.F., defendants promised to make comprehensive improvements in the outpatient mental health program. *Id.* § V.F.1 established an overall standard for outpatient mental health care at CMF:

> Defendants will provide appropriate psychiatric screening for each incoming inmate at CMF and will provide appropriate psychiatric evaluation and treatment for all inmates at CMF as medically indicated. (App. 87, § V.F.1.)

The specific requirements for the program and deadlines for its implementation are set forth in three pages of detailed provisions which follow in the Consent Decree: A new program for inmates discharged from inpatient care, known as the "outpatient psychiatric program," was to be developed and fully operational by June 30, 1990. (App. 87-88, § V.F.2.) A complete outpatient psychiatric program was to be fully staffed and operational by October 31, 1990. (App. 88-89, § V.F.3.) Specific standards, program elements and goals for the program are set forth, as is a procedure for evaluating defendants' compliance. (App. 87-90, § V.F.2-5.) These include, for example,

medical records and medication monitoring, staffing levels for clinical and custody staff, time limits for screening of incoming patients, and special programs for the mental health needs of the HIV-positive and patients discharged from inpatient psychiatric hospitalization. *Id.*

The Decree specifically assigns the Mediator the task of assessing the outpatient psychiatric program to determine if the program satisfies the standards set forth in §V.F. of the Decree:

> The Mediator, if necessary, will independently investigate the program, in the determination of the adequacy of defendants' program for providing appropriate psychiatric services.

(See App. 90, § V.F.5.)

The History of the Present Dispute

The present dispute began with a motion by plaintiffs in July of 1993 seeking to have defendants held in civil contempt for failing to design and implement the outpatient psychiatric program required by §V.F. (Ninth Circuit Supplemental Excerpt of Record ["SER"] 562.)

At a hearing before the Magistrate Judge on January 27, 1994, defendants restated their refusal to adopt any of the recommendations of the Mediator's experts for bringing defendants' outpatient psychiatric program into compliance with the Consent Decree, even those with which their own expert did not take issue. (ER 327.)

On July 25, 1994, the magistrate judge issued a Certification of Facts, Recommendations, and Order in which he found "that defendants are in willful and con-

temptuous disobedience of the orders of the district court." (CD 1122; SER 555; see SER 554-570.) The magistrate judge also issued an order directing the Mediator to work with his experts to prepare a revised Outpatient Psychiatric Program Plan for the district court to consider in fashioning a remedy. (CD 1121; SER 573-74.)

On October 27, 1994, the district court issued the order that is the subject of this appeal. The court made a factual finding that defendants' delay in developing and implementing an adequate psychiatric program or plan was knowing, persistent, and intentional. (App. 34, 38-41, 49-52.) The court also found that as a result of defendants' failure to comply with the Consent Decree, "inmates at the California Medical Facility . . . suffered and died as a result of conditions which the consent decree . . . was designed to correct." (App. 39.)

The district court held defendants in contempt for their failure to comply with § V.F.1. (App. 49-54.) The court also found that defendants had not complied with the more detailed subsections V.F.2 and V.F.3, requiring, for example, appropriate medication monitoring, appropriate recordkeeping, and the minimization of isolation and seclusion of mentally ill inmates in their cells. (See App. 45, n.11.) The court stayed, however, all contempt fines and established procedures, including issuance of an order to show cause and a hearing, before any contempt fines would be imposed on defendants.[1/] (App. 66, 68.)

[1/] For this reason, plaintiffs contended in the Ninth Circuit that the district court had not issued an appealable order. See *Donovan v. Mazzola*, 761 F.2d 1411, 1416-17 (9th Cir. 1985) (civil contempt not appealable until sanctions imposed); *S.E.C. v. Naftalin*, 460 F.2d 471, 475 (8th Cir. 1972) (same).

In part, the district court rested the finding of contempt on the fact that defendants resisted meaningful participation in the ADR process they helped create:

> The record of consistent disregard for deadlines, failure to cooperate with plaintiffs and the Mediator despite repeated findings of noncompliance, and overt defiance of the magistrate judge permit no other conclusion. Defendants have persisted in this pattern of procrastination and delay despite the threat of sanctions. . . . The sheer number of delays in the face of such cautionary notice generates an inescapable inference of intentional conduct.

(App. 40.) The court found that defendants refused "to cooperate in good faith with the very process designed to provide specific content to the terms of the decrees." (App. 54.)

The district court also relied on the lack of a factual showing by defendants supporting the adequacy of their Outpatient Program using any medical standard:

> [Plaintiffs' expert] Dr. Meenakshi assessed defendants' December 1993 [Outpatient Psychiatric Program] Plan and the actual operation of the [Outpatient Psychiatric Program] as of December 1994, and found both to be clinically inadequate on numerous grounds. . . . Defendants provide no grounds for doubting the accuracy of Dr. Meenakshi's observations or the validity of her expert opinions. No evidence contradicting her testimony was provided below.

(App. 38.) In other words, defendants made no factual effort to show they satisfied any possible meaning of the phrase "appropriate psychiatric evaluation and treatment as medically indicated." (App. 45-52.)

The district court rejected defendants' argument that § V.F.1 is too vague to enforce, finding that § V.F.1 is "clear and explicit" and "establishes a clinical standard for appropriate mental health care generally and for the adequacy of particular OPP elements, which are specified components of such care." (App. 56.)

In response to defendants' vagueness argument — an argument raised for the first time before the district court in October 1994, after years of discussion by the parties regarding the provision and the plans called for thereunder — the district court stated that:

> In the matter at bar, defendants had ample and repeated notice that their conduct violated the Decree. Fourteen separate orders of the court over a three-year period adopted findings of non-compliance with the provisions at issue here. Thus, defendants' campaign of stonewalling behavior cannot be construed as innocent conduct which breached an invisible or unascertainable boundary. . . .
>
> [Defendants'] argument [that the provision is too ambiguous to enforce] fails for several related reasons. First, as I have already explained, the due process concern for fair notice of violation is satisfied on the facts of this case. Second, because the phrases at issue were mutually agreed upon by the parties, and defendants have never sought

> their modification, the objections as to vagueness are disingenuous. . . .
>
> Having consented to a standard of adequacy explicitly based on clinical norms, defendants cannot credibly maintain that they have been unaware of the applicable standard or that its parameters have been unascertainable. The expert opinions on which the historical findings of non-compliance have been based have always been provided to defendants, and the concomitant recommendations for achieving compliance have been as regularly ignored.

(App. 48-50.) The court also found that "like the hard-core violator of an arguably vague statute, defendants have engaged in conduct that indisputably violates the consent decree." (App. 51.) The district court applied California contract law principles to interpret the Consent Decree and found the language unambiguous:

> The phrase "as medically indicated," as commonly understood, denotes care and treatment according to professional standards responsive to diagnostic criteria. The Decree by its terms affirmatively obligates defendants to provide treatment according to clinical psychiatric norms. . .

(App. 56.)

The Ninth Circuit Panel's Decision

On October 16, 1996, a panel of the Ninth Circuit Court of Appeals reversed the district court in the opinion that is the subject of this Petition. *Gates v. Shinn*, 98 F.3d

463 (9th Cir. 1996) (App. 1-24.). The Ninth Circuit panel posed the problem presented as follows:

> The issue of specificity of the consent decree, in this context, amounts to a choice of who decides, whose view shall prevail, on disagreements such as those described above [concerning 13 modifications to the psychiatric program plan proposed by defendants that were recommended by the Mediator's experts]. If the parties had consented to a decree which provided with specificity that the thirteen proposed modifications should prevail, or provided for a specific standard compelling them, then the district court would decide whether the prison psychiatric regime met the standard. In the absence of a decree "specific in terms," the district court would lack the power to decide.

98 F.3d at 471. After listing what it believed to be eleven different possible standards that "appropriate psychiatric care as medically indicated" could reference, the panel determined that the standard was too vague to enforce:

> [T]he only standard for assessment and development of the psychiatric program is the meaningless one that it should be "appropriate." The lack of specific terms in the decree by which to measure, implies that the prison officials did not consent to having the court decide whether the level of psychiatric evaluation and treatment measured up.

98 F.3d at 472. The panel reversed the finding of contempt and vacated the order imposing additional require-

ments on defendants, on the grounds that § V.F.1 "does not command any conduct with specificity." *Id.*

In so holding, the panel construed the Decree in a manner irreconcilable with two prior published decisions of the Ninth Circuit in the same litigation. In 1995, an earlier panel of the Ninth Circuit was asked to determine whether this very clause — § V.F.1 — is adequately specific to be enforced. The issue arose in connection with a dispute over procedures used by defendants to restrain severely psychotic mentally ill inmates. The panel determined that § V.F.1, "is a sufficiently specific standard with which to judge defendants' compliance." *Gates v. Gomez*, 60 F.3d 525, 531 (9th Cir. 1995).

Similarly, in 1994, in an earlier appeal, the Ninth Circuit determined that the standard "adequate custody staff to properly supervise" (in a different section of the Decree) was not vague or ambiguous and was fully enforceable. *Gates v. Rowland*, 39 F.3d 1439, 1444 (9th Cir. 1994).

On December 6, 1996, a timely Petition for Rehearing and Rehearing en Banc was denied. (App. 25-26.)

REASONS WHY THE PETITION SHOULD BE GRANTED

Introduction

> If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls 'the judicial power of the United States' would be a mere mockery.

Young v. United States ex. rel. Vuitton et Fils S.A., 481 U.S. 787, 796 (1987) (quoting from *Gompers v. Bucks Stove and Range Co.*, 221 U.S. 418, 450 (1911)). *Accord*, *Walker v. City of Birmingham*, 388 U.S. 894 (1967).

There are powerful reasons for the Court to review the issues presented here.

First, there are serious conflicts between the decision of the Ninth Circuit here and the decisions of other Circuits on the power of the district courts to remedy defiance of disputed consent decree provisions.

The holding here conflicts with the more sensible rule set forth by the Sixth Circuit in *Glover v. Johnson*, 934 F.2d 703 (6th Cir. 1991), which held: "defendants' failure to request the court to clarify, explain, or modify the language [of the consent decree] in the decade since the order was served precludes raising an ambiguity argument at this time." 934 F. 2d at 708. The Eleventh Circuit agrees with the Sixth. *Combs v. Ryan's Coal Co., Inc.*, 785 F.2d 970 (11th Cir. 1986).

Second, the Court should grant this petition to articulate the applicability of the national policy in favor of settlement and ADR in the Consent Decree context. The district court here determined that defendants refused "to cooperate in good faith with the very process designed to provide specific content to the terms of the decree." (ER 350.) The Ninth Circuit ignored both the role mediation plays in this case and defendants' defiance of the mediation process — a process defendants proposed and to which they consented.

Third, the Court should review this case to address the doctrine of "law of the case." The Court should exercise its supervisory authority to set forth a mandatory rule of deference within a circuit to the decisions of prior panels. Just such a prudential rule concerning the law of the case doctrine has already been adopted judicially by the Fifth Circuit and by the internal operating rules of the Third Circuit, which therefore squarely conflict with the Ninth Circuit. The very same Consent Decree provision which the Ninth Circuit opinion suggests is "meaningless," 98 F.3d at 472, was determined by a prior Ninth Circuit panel to be "a sufficiently specific standard with which to judge defendants' compliance." *Gates v. Gomez*, 60 F.3d 525, 531 (9th Cir. 1995).

I.

THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING WHETHER A DEFENDANT, WHO HAS FAILED TO SEEK MODIFICATION OR CLARIFICATION OF A CONSENT DECREE PROVISION, MAY RAISE VAGUENESS AS A DEFENSE TO CIVIL CONTEMPT

The rule of law that the Ninth Circuit has made in this case conflicts with decisions of the Sixth and Eleventh Circuits. The approach of the other Circuits should be approved because it takes into account the contractual nature of consent decrees and is more consistent with this Court's teachings. See *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1948); *Walker v. City of Birmingham*, 388 U.S. 307, 317 ("The breadth and vagueness of the injunction itself would . . . be subject to substantial constitutional question. But the way to raise that question was to apply to the Alabama courts to have the injunction modified or dissolved.").

This case is not distinguishable from the Sixth Circuit case of *Glover v. Johnson*, 934 F.2d 703 (6th Cir. 1991), a class action concerning the provision of equal educational and vocational opportunities to female prisoners in Michigan. In *Glover*, the defendant argued at a contempt hearing that provisions of a 1981 consent order requiring a "systematic and coherent course package" and paralegal training until there was "a pool of adequately trained writ writers" were ambiguous. The appellate court dismissed this contention:

> It suffices to say that the 1981 final order was a negotiated settlement between the parties. Defendants did not object to the language until now and have never asked the district court to clarify the purportedly ambiguous language. Moreover, we find the language unambiguous and, even if it were ambiguous, defendants' failure to request the court to clarify, explain, or modify the language in the decade since an order was served precludes raising an ambiguity argument at this time.

934 F.2d at 708-709.

This case also conflicts with *Combs v. Ryan's Coal Co., Inc.*, 785 F.2d 970 (11th Cir. 1986). In *Combs*, defendants argued that a provision requiring them to comply with a collective bargaining agreement violated the provision of Rule 65(d) that an injunction not incorporate another document by reference. In response to the defendants' argument, which relied on *International Longshoreman's Ass'n v. Philadelphia Marine Trade Ass'*, 389 U.S. 64, 76 (1967) (one of the cases relied on by the Ninth Circuit here, App. 13), the Eleventh Circuit made two determinations. First, that it was clear that *Longshoreman's*, which was concerned with fair notice, did not lay down a per se rule, since the decree at issue there could fairly be described as "unintelligible." *Combs*, 785 F.2d at 979. Second, like the Sixth Circuit, the Eleventh Circuit relied on the failure of defendants to seek clarification or modification:

> [A]t no time before the trial court did appellants ever complain about the adequacy of the consent decree which they themselves

> helped to craft. They made no attempt to request more specific language; they chose not to exercise their right to the usual remedy for inadequacies of this sort: a motion for clarification or modification of the consent decree.

785 F.2d at 979.

Both *Glover* and *Combs* draw on this Court's reasoning in *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1948). The defendants in *McComb* were found to be in violation of a court decree requiring them to refrain from violating a state minimum wage act. Defendants argued that this provision was too general to enforce. This Court disagreed:

> Decrees of . . . generality are often necessary to prevent further violations where a proclivity for unlawful conduct has been shown. [citation omitted]. . . [I]f there were extenuating circumstances or if the decree was too burdensome . . . there was a method of relief apart from an appeal. Respondents could have petitioned the District Court for a modification, clarification, or construction of the order.

336 U.S. at 192. *See also*, *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

So here. The district court rejected defendants' attempt to avoid a contempt citation stating: "because the phrases at issue were mutually agreed upon by the parties, and defendants have never sought their modification, the objections as to vagueness are disingenuous." (App. 49.)

Here, the Ninth Circuit nevertheless held as a matter of law that § V.F.1 of the Consent Decree, in which defendants contractually agreed to provide "appropriate psychiatric evaluation and treatment . . . as medically indicated," App. 87, § V.F.1, is "meaningless" and "does not command any conduct with specificity." 98 F.3d 472.

To the extent that the Ninth Circuit panel's holding is that the phrase "appropriate psychiatric treatment as medically indicated" does not, standing alone, command conduct with enough specificity to hold someone in contempt, plaintiffs agree with the panel. See F.R.C.P. 65(d). However, in this dispute, defendants were told in concrete terms what they needed to do to comply with the Consent Decree, by the person defendants agreed would make that determination. See App. 49-50; see also App. 90, Consent Decree § V.F.5. ("the Mediator, if necessary, will independently investigate the [outpatient psychiatric] program, in the determination of the adequacy of defendants' program for providing appropriate psychiatric services.").

This Ninth Circuit panel looked at the one phrase in isolation, divorced from context and from the contractual setting of the decree.

The approach of the Sixth and Eleventh Circuits is more in harmony with the key decisions and teachings of this court on the issues of consent decree interpretation pursuant to contractual and equitable principles. See *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-237 (1975) ("since consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts, without reference to the legislation the Government originally sought to enforce but never proved applicable through litigation."); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378, 112 S.Ct. 748, 116 L.Ed.2d 867, 883 (1992) (consent

decree "in some respects is contractual in nature"); *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 15 (1971) ("the scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies.").[2/]

The conflict between the Circuits on this critical issue should be resolved and this Court should endorse the holdings of the Sixth and Eleventh Circuits and reject the approach of the Ninth Circuit which is inconsistent with this Court's precedents concerning the enforcement of consent decrees and the power of a district court to enforce its lawful orders through contempt.

[2/] In addition, the panel did not give proper deference to the district court's interpretation of the Consent Decree in this case. See *Rufo*, 502 U.S. at 394 (1992) (O'Connor, J. concurring) ("Our deference to the District Court's exercise of its discretion is heightened where . . . the district court has effectively been overseeing a large public institution over a long period of time"); *Hutto v. Finney*, 437 U.S. 678, 688 (1978) (substantial deference given to district court given its "years of experience with the problem at hand").

II.

THE COURT SHOULD GRANT THE PETITION TO VINDICATE THE NATIONAL POLICY IN FAVOR OF SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION IN THE CONSENT DECREE CONTEXT

The Ninth Circuit's opinion ignores the importance of the Decree's mediation process in giving concrete content to disputed provisions and plans. In doing so, it undermines the agreement reflected in the Consent Decree. The furtherance of the national policy encouraging parties to settle rather than litigate disputes and to participate in good faith in ADR procedures requires review of the Ninth Circuit's decision.

The district court made two critical factual findings concerning the dispute resolution process employed by the Consent Decree here:

> 1. The dispute resolution process was designed to give content to disputed or general terms and provisions in the Consent Decree. (App. 54, 60); and
>
> 2. "Ongoing disputes [concerning the OPP] . . . have not been successfully resolved through the informal mediation process. . . Defendants have used these purported ambiguities as excuses for persisting in conduct which has explicitly been found non-compliant, and for refusing to cooperate in good faith with the very process designed to provide specific content to the terms of the Decree." (App. 54.)

The Ninth Circuit's failure to address these findings is inconsistent with this Court's teaching concerning the nature of consent decrees and the need for flexibility in remedial stages of complex institutional reform cases. *Cf.*, *Rufo*, *supra*, 502 U.S. at 381 ("The experience of the District Courts and the Courts of Appeals in implementing and modifying such decrees has demonstrated that a flexible approach is often essential to achieving the goals of reform litigation.")

The parties wisely chose to use a durable standard in the Decree, animated by the ADR process, to provide the flexibility to adjust to changes in medical science and to address unanticipated obstacles to the complex challenges of providing necessary mental health care within a high security prison.

The Ninth Circuit's rationale would require the parties to agree to rigid, inflexible standards which would discourage settlement of institutional reform cases.

In the last two decades, a clear national policy in favor of settlements and alternative dispute resolution has evolved, responding in part to the overwhelming number of cases clogging the federal courts. The decision of the Ninth Circuit here threatens to undermine that policy and discourage use of consent decrees.

The district court held defendants in contempt, in part, for failure to participate in good faith and for overtly resisting a system of mediation of disputes which defendants co-developed and consented to in the Decree. (App. 54, 60.) This ADR process, which includes the use of a Mediator defendants selected to informally and then formally attempt to settle disputes, has efficiently avoided federal court litigation of numerous disputes that have

arisen in this case. (*See e.g.*, CD 484-486, 492, 493, 512-513, 514, 529, 533, 534.)

The federal policy in favor of settlement is embodied in several of the Federal Rules of Civil Procedure. For example, in the 1983 Amendment Advisory Committee Notes to FRCP 16, it states that:

> Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible. . . . In addition to settlement, Rule 16(c)(7) refers to exploring the use of procedures other than litigation to resolve the dispute. This includes urging the litigants to employ adjudicatory techniques outside the courthouse.

Advisory Committee Notes to 1983 Amendment to Rule 16 of the Federal Rules of Civil Procedure. See also 1993 Amendments Advisory Committee Notes to Rule 16 ("the judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution. . .").

A clear Congressional policy in favor of settlement using alternatives to litigation is also expressed in the Civil Justice Reform Act of 1990, which authorized district courts to require that representatives "with authority to bind [parties] in settlement discussions" be available during settlement conferences. 28 U.S.C. § 473(b)(5). In addition, the Act calls for the development of expense and delay reduction plans which may include "authorization to refer appropriate cases to alternative dispute resolution programs," 28 U.S.C. § 473(a)(6), and "a neutral evaluation

program for the presentation of the legal and factual basis of a case to a neutral court representative." 28 U.S.C. § 473(b)(4).

The agreement to mediate here is usefully seen as analogous to the agreement to arbitrate in a collective bargaining setting. The Mediator, with "expertise in . . . correctional administration," App. 105, is like a labor arbitrator, who is conversant with the complex law of the shop. The use of an individual familiar with the organizational context in which she is deciding disputes is critical in these complex institutional settings. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579, 80 S.Ct. 1347, 4 L.Ed.2d 1413 (1960):

> There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective bargaining process demand a common law of the shop which implements and furnishes the context of the agreement.

The Consent Decree in this case contains a mediation process similar to labor arbitration in that "the processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the . . . agreement." *Steelworkers*, 363 U.S. at 581; See App. 54, 60, District Court Order (the mediation process is "designed to provide specific content to the terms of the decree.").

This Court should review this case to reaffirm the national policy in favor of settlement and ADR and to assure its applicability to settlement of complex disputes. The use of flexible and innovative consent decrees and the use of ADR in consent decrees and settlement agreements should be encouraged.

III.

THE COURT SHOULD GRANT THE PETITION TO ENHANCE JUDICIAL ECONOMY AND PROMOTE FAIRNESS AND CERTAINTY BY MAKING THE DOCTRINE OF LAW OF THE CASE MANDATORY RATHER THAN DISCRETIONARY

"In litigation generally, and in constitutional litigation most prominently, courts in the United States characteristically pause to ask: Is this conflict really necessary?" *Arizonans for Official English et al. v. Arizona*, ___ U.S. ___, 117 S.Ct. 1055, 1072 (March 3, 1997). The conflict created by the Ninth Circuit here is not necessary because every issue raised by defendants in this appeal was previously raised, litigated, and decided in a prior appeal — including the issue on which defendants prevailed before the Ninth Circuit here.

The doctrine of law of the case applies here. "Under the law of the case doctrine a decision of the court in a prior appeal must be followed in all subsequent proceedings in the same case." *Eichman v. Fotomat Corp.*, 880 F.2d 149, 157 (9th Cir. 1989). "[O]ne panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case." *Kimball v. Callahan*, 590 F.2d 768, 771 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979).

"The law of the case controls unless the first decision is clearly erroneous and would result in manifest injustice, an intervening change in the law has occurred, or the evidence on remand is substantially different." *Eichman*, 880 F.2d at 157 (citation omitted). The law of the case applies to "issues decided explicitly or by necessary implication in this court's previous disposition." *Liberty Mutual Insurance Co. v. EEOC*, 691 F.2d 438, 441 (9th Cir. 1982).

However, the law of the case doctrine is not binding in the Ninth Circuit. *Pit River Home and Agr. Co-Op Ass'n v. United States*, 30 F.3d 1088, 1097 (9th Cir. 1994) ("The law of the case doctrine is a discretionary one created to maintain consistency and avoid reconsideration, during the course of a single continuing lawsuit, of those decisions that are intended to put a matter to rest. Law of the case is not synonymous with preclusion by final judgment."); *United States v. Houser*, 804 F.2d 565, 567 (9th Cir. 1986) (law of the case doctrine "is discretionary, not mandatory"); *Hanna Boys Center v. Miller*, 853 F.2d 682, 686 (9th Cir. 1988) (law of the case doctrine "is not an inexorable command").

The law of the case doctrine should be binding here because the issue of whether § V.F.1 is a sufficiently specific standard to be enforced was already decided prior to this appeal. The Ninth Circuit panel in *Gates v. Gomez*, 60 F.3d 525 (9th Cir. 1995) determined that § V.F.1 of the decree, "is a sufficiently specific standard with which to judge defendants' compliance." *Id.* at 531. Similarly, in an even earlier appeal in this case, the panel in *Gates v. Rowland*, 39 F.3d 1439, 1444 (9th Cir. 1994) found that

the standard "adequate custody staff to properly supervise" was not vague or ambiguous and was fully enforceable.[3/]

The parties, the Mediator, the Magistrate Judge and the district court should have been able to rely on these earlier decisions in their conduct of the litigation and their joint effort to implement the remedial process set forth in the Consent Decree.

This Court should exercise its supervisory authority to unify the law and make the law of the case doctrine mandatory. Two Circuits have already done so. The Fifth Circuit has done so judicially. See *Harris v. Sentry Title Co.*, 806 F.2d 1278, 1282 (5th Cir. 1987) ("As this Court has noted in previous cases, 'In this circuit, . . . the law-of-the-case doctrine is supplanted by our firm rule that one panel cannot disregard the precedent set by a prior panel even though it perceives error in the precedent.'") (emphasis added). In the Third Circuit, the internal operating procedures of the Circuit prohibit reconsideration of an issue decided by an earlier panel. *Lesko v. Lehman*, 925 F.2d 1527, 1554 n. 26 (3rd Cir. 1991).[4/]

[3/] Another issue previously decided by a Ninth Circuit panel and ignored by this panel is that the Consent Decree here should be interpreted pursuant to principles of California contract law. See *Gates v. Rowland*, 39 F.3d at 1444.

[4/] The position of the other Circuits with respect to the amount of discretion given a panel in reconsidering an issue decided by a prior panel varies. Compare *Hanover Insurance Co. v. American Engineering Co.*, 105 F.3d 306, 312 (6th Cir. 1997) (doctrine of law of the case "discretionary" and "not an inexorable command") with *Cohen v. Brown*, 101 F.3d 155, 168 (1st Cir. 1997) ("we have

(continued...)

A number of courts have noted the strong policy reasons that support deference to the decisions of prior panels. See *Vieux Carre Property Owners Residents & Assocs. v. Brown*, 40 F.3d 112, 116 n. 6 (5th Cir. 1994) ("revision . . . of settled issues is imprudent in light of the superior knowledge of the original panel . . . and the risk of undermining litigation decisions of the parties adopted in reliance upon it"); *United States Office of Personnel Management v. FLRA*, 905 F.2d 430, 434 (D.C. Cir. 1990) (adherence to decisions of prior panels promotes judicial efficiency and discourages panel shopping).

In this case, no extraordinary circumstances are evident or mentioned to justify disregarding the Ninth Circuit's prior ruling. Here defendants simply repeated already defeated arguments in support of their defiance of the Consent Decree. Indeed, defendants again raised their ambiguity argument until they got the result they wanted. This kind of panel shopping causes uncertainty in the law, encourages multiple appeals and results in inefficient use of scarce judicial resources. It is also unfair to the litigants. It should be discouraged by making the law of the case doctrine mandatory.

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[4]/(...continued)
determined that issues decided on appeal should not be reopened" except in very rare circumstances).

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Writ of Certiorari.

Dated: April 4, 1997

Respectfully submitted

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Jay Lee GATES; John Ronald Bertram,	)	
	)	No. 94-17146
Plaintiffs-Appellees,	)	
v.	)	Argued and Submitted
	)	June 14, 1995
Ron SHINN; James Rowland Nadim Khoury, M.D., Assistant Deputy Director--CDC Health Services; Kenneth Shepard, Chief Deputy Warden for CMF Clinical; Nicholas Poulos, M.D., Daniel E. Thor, Chief Physician and Surgeon, CMF; Paul Morentz, Chief Psychiatrist--CMF Outpatient Program; H MD; Bruce Baker; A R MD, Chief Psychiatrist Northern Reception Center; D. Michael O'Connor; Douglas G. Arnold, Acting Director of the California Department of Mental Health; Clyde Murrey, Acting Deputy Director for State Hospitals; Sylvia R.N., Executive Director DMH Vacaville Psychiatric Program; Eddie Ylst,	)	Filed Oct. 16, 1996
	)	Appeal from the United States District Court for the Eastern District of California Lawrence K. Karlton, District Judge, Presiding
Defendants-Appellants.	)	

Before: GOODWIN, FARRIS and KLEINFELD, Circuit Judges.

KLEINFELD, Circuit Judge:

Prison officials were held in contempt of court for failing to obey a consent decree. The issue in the case is whether a consent decree requiring "appropriate" psychiatric care is specific enough to empower a court to hold prison officials in contempt for failure to do so. We conclude that it is not.

FACTS

Prisoners brought a class action challenging the constitutional adequacy of medical care at the California Medical Facility. The Facility is part of the California state prison system. It provides medical and psychiatric services for inmates from throughout the California state prison system. All members of the plaintiff class have been convicted of crimes, are being imprisoned for them, and have been sent to the Facility because of mental illness. The parties agreed to a consent decree. The provision of the decree at issue here required the facility to develop an outpatient psychiatric program which would provide "appropriate psychiatric evaluation and treatment" for prisoners. An interim program was to be in effect by June 30, 1990 and to be fully operational by October 31, 1990.[1/]

[1/] In its entirety, the relevant provision reads:

F. THE PROVISION OF APPROPRIATE PSYCHIATRIC CARE TO ALL PRISONERS AT CMF

(continued...)

[1/](...continued)

1. Defendants will provide appropriate psychiatric screening for each incoming inmate at CMF and will provide appropriate psychiatric evaluation and treatment for all inmates at CMF as medically indicated.

2. Defendants will prepare and implement a program, to be operational by June 30, 1990, to provide appropriate psychiatric care for prisoners discharged from the inpatient psychiatric programs at CMF and ASH. The outpatient program as implemented will address the following elements:

a. Reducing regression as much as possible by providing appropriate programing therapies;
b. Providing therapeutic programs designed to facilitate increased functioning, participation in prison programming and return to the general population;
c. Appropriate monitoring of medications;
d. Communication and consultation between inpatient and outpatient psychiatric staff.

3. Defendants will improve outpatient psychiatric services. The program will be in effect by June 30, 1990. Defendants will provide periodic reports to the Mediator concerning the program and its implementation. The program will be staffed and fully operational by October 31, 1990. The outpatient program will address the following issues:

a. Staffing levels for psychiatrists, psychologists, social workers, recreational and occupational therapists, nursing

(continued...)

[1/](...continued)
staff and custodial staff will be sufficient to provide appropriate access to psychiatric evaluation and treatment programs for all prisoners at CMF requiring such programs;

b. The need for additional staff will be periodically assessed ...

c. Treatment plans will be developed for all prisoners at CMF receiving psychiatric care....

d. Each prisoner referred to CMF from another institution (or from another unit within CMF) for psychiatric evaluation or treatment shall be examined and evaluated by a member of the clinical staff within 24 hours of his arrival at CMF and provided with appropriate treatment....

e. Appropriate space and facilities for treatment programs will be provided;

f. Appropriate access to psychiatrists and other mental health professionals will be provided to all prisoners based on their needs. The special psychiatric needs of prisoners diagnosed with HIV shall be addressed. All prisoners receiving psychotropic medications will be seen by a psychiatrist at appropriate intervals;

g. Medications will be appropriately monitored and appropriate medical records and charts will be maintained;

h. Each prisoner request to see a psychiatrist or psychologist will be documented in writing and responded to appropriately.

i. Isolation and seclusion in their cells of prisoners in need of psychiatric care will be minimized.

4. In an effort to comply with paragraphs 2 and 3 above, defendants will implement their Outpatient Program

(continued...)

***465** This appeal[2/] arises from disagreements about whether the facility's "outpatient" program is consistent with the terms of the consent decree. The prisoners are of course not "outpatients" in the usual sense of the word. They do not get out. Generally, an outpatient is someone who gets treatment at a hospital but does not occupy a bed there. An ordinary outpatient goes home to bed. The "outpatients" in California Medical Facility's outpatient psychiatric program do not occupy a bed at the prison hospital, but they do stay in the Facility. Unlike most non-prisoner outpatients, they do not live in the outside community.

The consent decree has involved years of detailed supervision by the district court of the Facility. The warden filed a declaration that "more than 10 million dollars has been expended on construction, equipment, contract costs, compliance team costs, and the expenses

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[1/](...continued)
Guide.

5. Defendants will evaluate their program for providing psychiatric evaluation and treatment in October 1990 and report to the Mediator by December 15, 1990. The Mediator, if necessary, will independently investigate the program, in the determination of the adequacy of defendants' program for providing appropriate psychiatric services.

[2/] This consent decree has resulted in extensive litigation. Published decisions by this court stemming from this decree include: Gates v. Deukmejian, 987 F.2d 1392 (9th Cir.1992); Gates v. Rowland, 39 F.3d 1439 (9th Cir.1994); Gates v. Rowland, 60 F.3d 525 (9th Cir.1995).

directly related to Gates," but compliance has been found by the court to be so inadequate as to amount to contempt of court. The court has concluded that the consent decree requires much more extensive changes in staffing and methods of treatment than the Facility has been willing to adopt.

The prisoners moved to hold the officials of the Facility in contempt for failing to provide adequate care and for failure to meet deadlines set by the mediator. Pursuant to the consent decree, the court had appointed a mediator nominated by the defendants to develop institutional reforms in consultation with the prison officials, lawyers for the plaintiff class, prison psychiatry experts, and others. The district judge referred the motion to a magistrate judge, who directed the defendants to present a revised plan for an outpatient psychiatric program to the mediator.

The mediator and his experts reviewed the plan, and suggested thirteen modifications. The mediator recommended that the prison officials be found in contempt if they rejected the thirteen modifications. They declined, and the magistrate judge recommended to the district court that they be found in contempt.

The district court held the prison officials in contempt of court. The finding of contempt was based on the consent decree provision that the facility "provide appropriate psychiatric screening for each incoming inmate at CMF and ... provide appropriate psychiatric evaluation and treatment for all inmates at CMF as medically indicated." We are impressed with the difficulty of the problem faced by the district judge in trying to assure that the Facility provided adequate and appropriate treatment to avoid inhumane and dangerous conditions. We are also

impressed by the daunting challenge the prison officials faced in dealing with mentally ill criminals in a way which would prevent them from hurting themselves or others, while trying to comply with the orders of a district court mediator. We conclude that the prison officials should not have been held in contempt of court, because the term "appropriate" had no specific meaning in this decree.

The mediator had construed "appropriate" to mean the "community standard of care" for outpatients. He thought his thirteen proposed modifications were in accord with a "community standard," the decree required that standard, and the prison had willfully refused to meet it. The prison officials had hired as the Facility's chief psychiatrist for program development a physician who had been the mediator's expert earlier in the litigation. That physician said there was no ***466** such thing as a "community standard" of psychiatric care for prisoners with mental diseases. He said treatment in the community varied, what the mediator wanted was more than any community programs provided, and treating the prisoners as though they were in the non-criminal, non- institutionalized community would be inappropriate.

The district judge agreed with the prison officials that the decree did not adopt a "community standard" of outpatient psychiatric care. He found that the mediator's "community standard" was "not to be found within the four corners of the Consent Decree," and "has no recognizable criteria in psychiatric literature or practice," so "is too speculative to be enforced." The district judge nevertheless found the prison officials to be in contempt of court. The district court construed "appropriate psychiatric screening" and "appropriate psychiatric evaluation and treatment ... as medically indicated" to mean what he called a "clinical standard of care," referring to what was "medically

indicated" under accepted "professional standards": For these reasons, the standard applicable to adequate Psychiatric care in this case is to be determined by the language of the decree. Section V.F.1. provides that defendants shall provide "appropriate" Psychiatric evaluation and treatment "as medically indicated " (emphasis added). This language clearly establishes a clinical standard for appropriate mental health care generally and for the adequacy of particular [outpatient Psychiatric program] elements, which are specified components of such care. The phrase "as medically indicated" as commonly understood, denotes care and treatment according to professional standards responsive to diagnostic criteria. The Decree by its terms affirmatively obligates defendants to provide treatment according to clinical psychiatric norms, rather than merely refraining from the deliberate indifference forbidden by the Eighth Amendment. All future determinations of compliance with the general "appropriate evaluation and treatment" provisions of section V.F., including the "appropriateness" of the various mandatory [outpatient Psychiatric program] elements specified in sections V.F.2 & 3, shall be made according to general clinical standards for the treatment of the psychiatric conditions at issue. This standard governs both the adequacy of the [outpatient Psychiatric program] plan and the adequacy of actual care and treatment to be provided under a fully implemented [outpatient Psychiatric program]. (citations omitted). Holding the prison officials in contempt of court, the court required them to comply with the mediators' thirteen proposed modifications, as an exercise of its remedial powers to cure the contempt. The judge explained that "where a finding of contempt has been made, the court may exercise its broad equitable remedial powers" and that "a remedial order following a contempt finding may include new requirements to serve the original intent of the consent decree." The court also determined

that, even had a contempt finding not been made, enforcement of the thirteen proposed modifications would be appropriate under the consent decree.

The prison officials were "adjudged to be in civil contempt" and were sanctioned $10,000 per day for every day they were not in compliance. The court appointed the mediator to be a special master. The district court stayed the monetary sanctions so long as the prison officials complied with the special master's directives for implementation of the modified outpatient plan by the deadlines to be set by the special master. The special master was to report any failures by the prison officials to do what he said, when he said, and "[s]uch a report will result in the issuance of an Order to Show Cause before the district judge why sanctions should not become immediately due from the date of the certified violation until compliance with the proposed provision as certified by the Master."

We stayed the contempt order pending appeal.

ANALYSIS

A. Jurisdiction

[1] The prisoners argue that we have no appellate jurisdiction because there is no final ***467** order. The issue arises because the district court stayed the $10,000 per day penalty. We conclude that the order was final under 28 U.S.C. s 1291, so we have appellate jurisdiction.

[2] Though the $10,000 per day in monetary sanctions was stayed, the district court order imposed two adverse consequences on the prison officials. First, the obloquy of contempt has been adjudicated against them. Second, the district court has required them to make the changes required by the special master, as a remedy for their

contempt of court. This case is analogous to Stone v. City and County of San Francisco, 968 F.2d 850 (9th Cir.1992). As we held in Stone, neither the undetermined total amount of sanctions, nor the fact that the sanctions are conditional, defeats finality of a post- judgment contempt order. Id. at 855. Accord Shuffler v. Heritage Bank, 720 F.2d 1141, 1145 (9th Cir.1983) ("Once the finding of contempt has been made and a sanction imposed, the order has acquired all of the 'elements of operativeness and consequences necessary to be possessed by any judicial order to enable it to have the status of a final decision under section 1291.' ").

[3] We have interpreted Firestone Tire and Rubber Company v. Risjord, 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981), in the context of a post-judgment contempt order imposing sanctions for violating a consent decree, as justifying review based on "pragmatic concerns." Stone v. City of San Francisco, 968 F.2d at 855. We balance the "inconvenience of piecemeal review" against the "danger of denying justice by delay." Id. A consent decree is a judgment. Where a decree has come down, the respondent has been held in contempt of court for violating it, and sanctions have been ordered for the contempt but stayed, the appealability of the contempt order depends on this "pragmatic" balancing. As in Stone, the balance tips in favor of allowing the appeal. We have already published three appellate decisions in this case, this being the fourth, so it is plainly impossible to avoid the "inconvenience of piecemeal review." The contempt order and $10,000 per day in sanctions amount to a persuasive hammer the special master is to use against the prison officials, so the "danger of denying justice by delay" is plain if the prison officials cannot now litigate whether the thirteen modifications are required by the consent decree.

We conclude that pragmatic concerns weigh in favor of reviewing the contempt order now. We now determine whether the decree on which the order was based could properly serve as a basis for a contempt citation.

B. Specificity of the Consent Decree

The core of the prison officials' argument is that the decree was not specific enough, with regard to the matters at issue, to support a determination that they were in contempt of court for violating it. The provision at issue requires "appropriate psychiatric evaluation and treatment for all inmates at CMF as medically indicated." We analyze how the prison officials are supposed to have violated the decree, and whether the decree could support a finding that the psychiatric care afforded violated it.

1. The required specificity.

The order holding the prison officials in contempt focuses upon two violations of the consent decree: the prison officials failed to provide appropriate psychiatric care in the outpatient screening and treatment program, and failed repeatedly to comply with the mediator's deadlines for curing the inadequacies. Failure to meet deadlines to cure the violation of the decree could not furnish a basis for the contempt unless there was a violation of the decree. The contempt order therefore stands or falls on whether there was a violation of the consent decree. For the contempt order to stand, the decree has to have been specific enough to require the thirteen proposed modifications to the outpatient psychiatric plan.

[4] An injunction must be "specific in terms" and describe "in reasonable detail" the acts sought to be restrained. Fed.R.Civ.P. 65(d). Specificity in the terms

of consent decrees is a predicate to a finding of contempt. Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc., 689 F.2d 885, 889 ***468** (9th Cir.1982); Harris v. City of Philadelphia, 47 F.3d 1342, 1349 (3rd Cir.1995).

[5,6] The consent decree is an injunction. A judgment issued by a court in the exercise of its equitable or admiralty jurisdiction is called a decree, and when a decree commands or prohibits conduct, it is called an injunction. Consent decrees differ from contested injunctions in that, instead of being won in contested litigation, they are issued by the court pursuant to an agreement of the parties. A consent decree is therefore "in some respects contractual in nature," but the equitable decree based on the agreement "is subject to the rules generally applicable to other judgments and decrees." Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 378, 112 S.Ct. 748, 757, 116 L.Ed.2d 867 (1992). Courts must find the meaning of a consent decree "within its four corners," and not by reference to the court's purpose or the purpose of the party seeking to hold the other in contempt because the party seeking the contempt did not win its case: [T]he decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation. United States

v. Armour & Co., 402 U.S. 673, 681-82, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256 (1971) (emphasis in original, footnote omitted).

[7] If an injunction does not clearly describe prohibited or required conduct, it is not enforceable by contempt. As the Supreme Court has explained: The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid. International Longshoremen's Ass'n. v. Philadelphia Marine Trade Ass'n, 389 U.S. 64, 76, 88 S.Ct. 201, 208, 19 L.Ed.2d 236 (1967).

As applied to this case, these requirements for specificity within the four corners of the decree require a distinction between the specificity of the consent decree, and the specificity of the mediator's recommendations. The consent decree itself, not merely the mediator's subsequent directives, must command the prison officials to provide the level of psychiatric care at issue, or else they cannot be held in contempt of court for failing to provide it. The problem of specificity is not whether the prison officials could avoid penalties by doing what they were told from time to time by the mediator. He could have no power to require more than the consent decree did. The only way to justify the contempt order is by finding that the requirement in the consent decree of an "appropriate" level of psychiatric care was sufficiently "specific in terms" to

provide for what the mediator required.[3/]

***469** 2. The violation.

As we explain above, the consent decree itself had to be "specific in terms." We assume without deciding that the mediator's thirteen proposed modifications to the Facility's outpatient psychiatric plan were specific enough, so that had they been part of the consent decree, failure to implement them would support a contempt. The gravamen of the contempt was that the prison officials refused to adopt the thirteen modifications, which the court concluded were embraced by the consent decree requirement of an

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[3/] Emphasizing that the underlying concern when enforcing consent decrees is 'fair notice', the district court concluded that the mediator's directives gave the defendants "ample and repeated notice that their conduct violated the Decree." But fair notice must be found "within [the] four corners" of the consent decree. See Armour, 402 U.S. at 682, 91 S.Ct. at 1757. This requirement protects a party who agrees to a consent decree from obligations to which that party has not agreed. Id. at 681- 82, 91 S.Ct. at 1757-58. The prison officials are not saying "we did not know we were supposed to use clozapine, have 2.5 staff to track developmentally disabled inmates, assemble dangerous inmates in groups for group therapy, and give our psychiatrists 20 hours a year of continuing medical education." They are saying "we do not think those requirements are 'appropriate,' and we did not agree to them when we consented to the decree."

"appropriate psychiatric evaluation and treatment." [4/]

[4/] The district judge found that the prison officials had repeatedly failed to meet past deadlines, but expressly decided that "there remains no concrete action to compel via civil sanctions" regarding these past delays. The judge therefore did not hold the prison officials in contempt based on missed deadlines. 10/27/94 order at 18. The judge found that the "outstanding non-compliance involves the substantive adequacy of defendant's submissions and actions." 10/27/94 order at 18. He noted that the magistrate had given the prison officials one last chance to submit a complete, revised plan for the Outpatient Psychiatric Program, but the mediator's experts concluded that it would satisfy the consent decree only if thirteen specified modifications were made. 10/27/94 order at 4-5. The judge found that the prison officials were not providing "appropriate evaluation and treatment for all inmates at CMF as medically indicated." 10/27/94 order at 19. He accordingly found them in contempt of section V.F of the consent decree. In a footnote, the contempt order says that the facts establish "not only violations of the general mandate regarding appropriate care and an adequate OPP, but the particular requirements of appropriate medication, monitoring, evaluations, recordkeeping, etc. See Sections V.F.2 & 3." 10/27/94 order at 19. The particulars referred to appear to be the disagreements discussed below relating to clozapine, staffing, treatment protocols, etc., though the order does not specify what they are. Sections V.F.2 and V.F.3 specify elements to be addressed in a plan "to provide appropriate psychiatric care," as by "appropriate programming therapies," "appropriate monitoring of medications," and "communication and consultation." A program to "improve" outpatient psychiatric services was

(continued...)

We review now a few of the specific disagreements about the mediator's thirteen proposed modifications, to see whether the words of the consent decree provide sufficient specificity to resolve them. The prison officials presented evidence, mostly affidavits from Richard M. Yarvis, M.D., supporting their view of what was "appropriate."

The prison officials proposed to provide a coordinator to keep track of developmentally disabled and mentally retarded inmates, and ensure that they received all necessary psychiatric treatment. The mediator proposed a "team" for this purpose consisting of "0.5 Psychiatrist, 1.0 Psychologist, 1.0 Social Worker." Except for the psychiatrist, these staff "will not be assigned any collateral

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[4/](...continued)
to "address" issues including staffing levels sufficient to provide "appropriate" access to programs, examination within 24 hours of referral from another institution followed by "appropriate treatment" in "appropriate" facilities with "appropriate" access to staff, with medications to be "appropriately" monitored and responses to prisoner requests to see psychiatrists and psychologists to be documented in writing and responded to "appropriately." There are some specifics not measured by the term "appropriate" in these subsections, but none of these specifics furnished the basis for the contempt determination. As is obvious from the quotations, all the more specific sections relating to the contempt measure the required conduct by what is "appropriate." The prison officials had one idea of what was "appropriate," furnished largely by their psychiatric expert, the mediator had another furnished by his psychiatric experts (the thirteen modifications), and the district court agreed with the mediator.

duties in the OPP"[5/] and "will report to the chief psychiatrist for the outpatient psychiatric program." The chief psychiatrist for program development at the Facility stated this would be "an excessive expenditure of resources" for the case load of "approximately fifty developmentally disabled individuals" who reside at the Facility at any given time.

***470** The mediator wanted the prison to use an antipsychotic medication called clozapine. The prison's psychiatric expert thought clozapine was too risky a medication: Clozapine is a new medication and one to which some significant risks are attached. There is considerable disagreement at the present time among CMF psychiatrists as to whether clozapine can be used safely at the facility.... Moreover, new medications with potentially less risk are about to come on line in psychiatric practice.

The mediator wanted the Facility to adopt specific treatment protocols for various psychiatric conditions. Dr.

[5/] In the decree, the parties' briefs, and many of the quoted excerpts, the outpatient psychiatric program is referred to as an "OPP" and expanded versions of the outpatient program guide as "plans." Typically in institutional litigation, the lawyers working on the same case for years develop their own vocabulary of case-specific terms and abbreviations, sometimes built on the institution's internal set of abbreviations. The writer and most readers have never seen this case before and will probably never see it again, so for us, use of the case-specific terms and abbreviations obfuscate. We use descriptive terms rather than abbreviations in this opinion to save the reader the need to memorize an abbreviation vocabulary list in order to understand the opinion.

Yarvis said that the psychiatric profession did not agree what specific treatment protocols were appropriate for most of the diseases the Facility had to deal with: The American Psychiatric Association has addressed the problem of defining practice parameters for many months and to date has been unable to reach a consensus with respect to any but two diagnostic categories, depressive disorders and eating disorders. It is both unrealistic and unreasonable to expect the psychiatric staff at CMF will succeed in a few months where a preeminent psychiatric organization has failed to date.

The prison officials thought some of the thirteen proposed modifications would be too dangerous. Dr. Yarvis said "dangerousness adds an important dimension" because "many have been convicted of violent criminal offenses and have been sentenced by the courts to the custody of the CDC for that reason." For example, the thirteen proposed modifications required a group therapy program which Dr. Yarvis said raised "safety issues," and "may prove impractical when applied to a highly dangerous patient population such as is found at CMF." Dr. Yarvis pointed out that many of the patients suffered not only from their psychiatric disorders, but from "severe character pathology" which does "not yield readily and sometimes not at all, to psychiatric intervention." There were high levels of "treatment noncompliance," "malingering," and "inaccurate technical information provided to [clinicians] by patients." Additionally, the prison officials contended: The August, 1994 Plan generally fails to account for the extremely dangerous, highly unpredictable nature of many [outpatient psychiatric program] inmates. CMF has one of the highest inmate-to-staff assault ratios in the [California prison system]. This is directly attributable to the type of inmates housed in the [program]. The August 1994 Plan displays a basic lack of understanding of the dangerous

level of inmates, poor physical plant design, and staffing realities. Mandating extensive out-of-cell program time, without regard to inmate assaultiveness, will only serve to drive upward the number of inmate-on-inmate assaults and inmate-on-staff assaults. The Mediator apparently based the August, 1994 Plan in large part on community mental health facilities. He does not sufficiently acknowledge that the population served in mental health programs at CMF is more violent. This fact requires a much more secure environment than is found at any mental health program outside correctional facilities. This is a critical difference. CMF does not want to foster an environment that will be unsafe for inmates and staff.

The mediator also proposed twenty hours of continuing medical education per year for psychiatrists, but Dr. Yarvis said this exceeded any standard with which he was familiar, and was far in excess of what he thought was needed, which would be four to five hours of psychopharmacological training per year.

As these disputes illustrate, the prison officials and the mediator differed, from the standpoint of what was medically indicated, regarding whether the thirteen proposed modifications would be "appropriate psychiatric evaluation and treatment" or not. The issues were matters of medical and administrative expertise. The district court never said that it was rejecting Dr. Yarvis's opinions as to what was "appropriate psychiatric evaluation and treatment," or explained why the mediator's view and not Dr. Yarvis's was correct with regard to what sort of psychiatric care was "appropriate."

***471** 3. Was the decree sufficiently specific?

The district court order, effectively turning much

control of the Facility over to a special master, raises troubling issues in the context of a correctional institution. We are required to "accord deference to the appropriate prison authorities." Turner v. Safley, 482 U.S. 78, 85, 107 S.Ct. 2254, 2259, 96 L.Ed.2d 64 (1987). These inmates, in addition to being criminals, are mentally ill, so some of the restraints which induce sane people to behave themselves even if of a criminal disposition will not restrain these inmates. As the prison officials' evidence showed, the inmates are more apt than non-criminal victims of mental illness to lie about their symptoms, sell their medication, and injure or kill staff, each other, and themselves. The mentally ill and disabled people would not have been convicted of crimes and placed in the Facility, after all, had they not demonstrated an inability or disinclination to behave themselves.

The issue of specificity of the consent decree, in this context, amounts to a choice of who decides, whose view shall prevail, on disagreements such as those described above. If the parties had consented to a decree which provided with specificity that the thirteen proposed modifications should prevail, or provided for a specific standard compelling them, then the district court would decide whether the prison psychiatric regime met the standard. In the absence of a decree "specific in terms," the district court would lack the power to decide. We now examine the meaning of the phrase in the decree, "appropriate psychiatric evaluation and treatment," as construed by the district court to mean a "clinical standard" for psychiatric evaluation and treatment "as medically indicated," to see whether it is specific in terms with reference to the dispute about the level of psychiatric care.

[8] The question is whether there was a specific meaning to the term "appropriate level of psychiatric

evaluation and treatment," with or without the modifiers "as medically indicated," and "clinical standard." These sound like meaningful professional medical terms, but no showing was made of any specific meaning to them in the prison psychiatric context.

Here are a few of the many things a "medically indicated" level of "appropriate" psychiatric could mean: (1) avoidance of "egregious or flagrant conditions" which would violate the civil rights of institutionalized persons under 42 U.S.C. s 1997a(a); (2) the level of care in other state psychiatric prison facilities; (3) the level of care in federal institutions; (4) recommendations in some medical treatise; (4) standards published by some professional association, perhaps the American Medical Association, American Psychiatric Association, or American Correctional Association; (5) state medical malpractice standards; (6) treating physician's recommendations; (7) chief psychiatrist's recommendations; (8) California private medical insurers' standards for what treatment is compensable; (9) provisions commonly written into California private health maintenance organization contracts; (10) accreditation standards of some relevant professional board; (11) the Eighth Amendment, had the decree not expressly rejected that as the standard.

The practical effect of such a vague standard, "appropriate" psychiatric care, is that the prison, and the state budget for the prison, remain under the continuing and largely unfettered supervision of the district court and its magistrate judge, mediator, special master, and experts, instead of the state political process and appointed prison administrators.

The vagueness of the psychiatric care standard is in striking contrast to other parts of the consent decree. For

example, the decree requires the prison officials to "develop written treatment guidelines," nonbinding, for nine listed diseases, such as asthma, tuberculosis, and diabetes mellitus. Mental illness is not in the list, and the prison's psychiatric expert says such protocols would be impractical because the profession has not agreed on any except for eating disorders and depression. Yet the contempt order implicitly assumes that the prison officials consented to developing written protocols for all mental illnesses. The consent decree says that the prison officials must hire a particular consultant ***472** to assess and develop a quality assurance program, and the consultant must use the standards of the Joint Commission on the Accreditation of Healthcare Organizations for that purpose. Yet the only standard for assessment and development of the psychiatric program is the meaningless one that it should be "appropriate." The lack of specific terms in the decree by which to measure, implies that the prison officials did not consent to having the court decide whether the level of psychiatric evaluation and treatment measured up.

This case is not distinguishable from Balla v. Idaho State Bd. of Corrections, 869 F.2d 461 (9th Cir.1989). In Balla, we held that an injunction requiring a "systematic" screening program and "sufficient" mental health professionals could not support a contempt finding: Civil contempt is appropriate only when a party fails to comply with a court order that is both specific and definite. Thus, to support a contempt motion, the order alleged to have been disobeyed must be sufficiently specific. The standards cited by the prisoners in the November 1 order are too vague to support a contempt motion. They include such requirements as a "systematic" program for screening and evaluation, participation of "sufficient" numbers of mental health professionals, and implementation of a "basic" program for identifying, treating and supervising

suicidal prisoners. Id. at 465 (internal citations omitted). This is not a holding to be avoided by substituting some unspecific words, like "appropriate," for others, like "sufficient."

We acknowledge our holding in Gates v. Shinn, 60 F.3d 525 (9th Cir.1995) that "appropriate psychiatric treatment as medically indicated" is "a sufficiently specific standard with which to judge defendants' compliance." Id. at 531. That case, however, involved a challenge to a tactic for controlling mentally ill inmates that "ha[d] not been approved by the American Psychiatric Association, the American Medical Association, or any other correctional standard setting body." Id. at 528. The standard of "appropriate treatment" was sufficient because the tactic was so clearly inappropriate. By contrast, reasonable minds can and do differ as to whether the defendant's outpatient plan provided for "appropriate psychiatric treatment." The standard of "appropriateness" is therefore insufficiently specific to uphold the district court's contempt order.

CONCLUSION

The order finding the prison officials in contempt and imposing sanctions and additional requirements on them is VACATED, and the decision of the district court is REVERSED. The consent decree cannot support a contempt finding for failure to provide an "appropriate level" of psychiatric screening and care, because that provision does not command any conduct with specificity.

We do not reach the prison officials' argument that they were not afforded due process in the contempt proceedings, because we vacate the contempt citation on other grounds. We also do not reach such questions as

may arise under the Prison Reform Litigation Act, Public Law No. 104-134, changes in 18 U.S.C. s 3626(b)(2), 18 U.S.C. 3626(f), 18 U.S.C. s 3626(a). We have dealt only with the matter put before us on appeal, the contempt order for alleged past violation of a decree. The effect of the Prison Reform Litigation Act on the decree will doubtless be raised before the district court.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAY LEE GATES,	)	No. 94-17146
	)	
Plaintiffs-Appellees,	)	D.C. No. CV-87-01636-LKK
v.	)	
	)	ORDER
RON SHINN; JAMES ROWLAND; NADIM KHOURY, M.D., Assistant Deputy Director - CDC Health Services; KENNETH SHEPARD, Chief Deputy Warden for CMF Clinical; NICHOLAS POULOS, M.D., DANIEL E. THOR, Chief Physician and Surgeon, CMF; PAUL MORENTZ, Chief Psychiatrist - CMF Outpatient Program; H MD; BRUCE BAKER; A R MD, Chief Psychiatrist Northern Reception Center; D. MICHAEL O'CONNOR; DOUGLAS G. ARNOLD, Acting Director of the California Department of Mental Health; CLYDE MURREY, Acting Deputy Director for State Hospitals; SYLVIA R.N., Executive Director DMH Vacaville Psychiatric Program; EDDIE YLST,	)	Filed December 6, 1996
	)	
Defendants-Appellants.	)	

Before: GOODWIN, FARRIS and KLEINFELD, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Kleinfeld has voted to reject the suggestion for rehearing en banc, and Judges Goodwin and Farris so recommend.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOHN LEE GATES, et al.,	No. CIV. S-87-1636 LKK
Plaintiffs	ORDER
v.	Filed October 27, 1994
JAMES GOMEZ, et al.,	
Defendants.	

This matter is before the court on the Magistrate Judge's Certification and Recommendations re Contempt. Plaintiffs moved for an order of contempt on July 19, 1993, alleging that defendants have violated the Consent Decree and numerous related Orders regarding the development and implementation of an adequate Outpatient Psychiatric Program ("OPP") at the California Medical Facility ("CMF"), Vacaville. The motion was referred to the magistrate judge for findings and recommendations by Order of August 13, 1993. Following a contempt hearing and numerous attempts to facilitate a less drastic resolution of the dispute, the magistrate judge filed his Certification of Facts supporting a finding of contempt on July 25, 1994. The matter was heard before this court on October 3, 1994.

For the reasons I now explain, the factual findings of the magistrate judge are hereby approved and adopted, and his recommendations are adopted as modified below.

I.

FACTS

This class action lawsuit was initiated in 1987 to challenge the constitutional adequacy of medical care provided to inmates at CMF Vacaville. A Consent Decree was entered on March 8, 1990, following a three-month trial before the magistrate judge. The Decree provides a comprehensive framework for the provision of medical and mental health care, the treatment of inmates with disabilities and AIDS, and related prison conditions. The Decree provides for the appointment of a Mediator to facilitate dispute resolution, supervise implementation, and oversee compliance. The Mediator subsequently appointed by the court was the nominee of the defendants.

Section V.F. of Consent Decree governs the provision of psychiatric care to CMF inmates. It requires generally that defendants "provide appropriate psychiatric screening for each incoming inmate at CMF and . . . provide appropriate psychiatric evaluation and treatment for all inmates at CMF as medically indicated." Section V.F.1. The development and implementation of an OPP is mandated to "provide appropriate psychiatric care for prisoners discharged from . . . inpatient psychiatric programs." Section F.V.2. The OPP was to have been operational in interim form by June 30, 1990, and fully staffed by October 31, 1990. Sections V.F.2 & 3.

Necessary elements of the OPP and issues to be addressed by the Program are specified in the Consent

Decree. Requirements include "appropriate programming and therapies;" "appropriate monitoring of medications;" "staffing levels . . . sufficient to provide appropriate access to psychiatric evaluation and treatment;" "appropriate space and facilities;" and "appropriate access to psychiatrists and other mental health professionals." Id.

After initial deadlines were missed and extended, defendants submitted an OPP Plan in October 1990. Plaintiffs did not object to the substance of the Plan, but strongly objected to defendants' timeline for implementation, which was inconsistent with the plain requirements of the Consent Decree. The Mediator approved the Plan in substance, and determined that it would be binding for monitoring purposes beginning on December 1, 1990. Disputes regarding implementation dates were left to the dispute resolution process established by the Decree.

Since that time, the Mediator's regular Progress Reports have consistently concluded that defendants are not in substantial compliance with section V.F. See Progress Reports 3 through 17. Each of these Reports have been approved and adopted by this court. During the life of the Decree, plaintiffs have repeatedly challenged defendants' failure to meet their own implementation deadlines, disputed the adequacy of various plans for OPP improvement, and disputed the adequacy in practice of those OPP elements which have been implemented. Frustrated with the lack of progress on these issues, plaintiffs noticed Perceived Violation ("PV") A-6 on February 12, 1992, alleging defendants' general failure to provide "adequate mental health treatment" as required by the Consent Decree.

The Mediator formally issued PV A-6 on October

15, 1992, after preliminary conciliation attempts failed. The ensuing mediation process was not initially successful, and plaintiffs filed this motion for contempt on July 19, 1993. The motion seeks (1) a finding that defendants are in civil contempt; (2) retention of an independent expert to draft a new OPP Plan and implementation schedule; (3) fines of $10,000 per day until compliance with section V.F. is reached; and (4) such other relief or sanctions as may be necessary to ensure compliance. The Mediator suspended proceedings on PV A-6 in deference to the contempt motion before the court.

The motion was heard by the magistrate judge on September 2, 1993. In an effort to avoid a finding of contempt by obtaining voluntary compliance, the magistrate judge ordered defendants to submit a complete and revised OPP Plan. Defendants accordingly produced their December 1993 Plan, which was duly evaluated by the Mediator's court-appointed experts. The Experts' Report, dated January 1994, concluded that defendants' 1993 Plan would satisfy the Consent Decree only if 13 specified modifications were made. Defendants refused to make the recommended changes, and began implementation on their own terms. The magistrate judge consequently certified facts to the district court supporting a finding of contempt. In addition, he issued a separate Order directing the Mediator to draft a proposed OPP Plan for the consideration of the district judge in fashioning a remedy for contempt. The Mediator submitted his draft OPP Plan in August 1994, and the parties have been provided an opportunity to respond.

Defendants have objected to the Magistrate Judge's Certification of Facts and Recommendations, as well as to the propriety of the separate Order and this court's consideration of the Mediator's Plan. Plaintiffs have

requested that this court not only adopt the recommendation of the magistrate judge regarding civil contempt, but also initiate criminal contempt proceedings and impose Rule 11 sanctions.

II.

STANDARDS

The motion for contempt was referred to the magistrate judge for findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(B), which governs referral of dispositive motions. A magistrate judge's determination concerning matters referred under this section are, for the most part, reviewed de novo.

Specifically, the district court reviews de novo those portions of the proposed findings of fact to which objection has been made. 28 U.S.C. § 636(b)(1)(C); McDonnell Douglas Corp. v. Commodore Business Machines, 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982). The court may, however, assume the correctness of that portion of the proposed findings of fact to which no objection has been made, and decide the motion on applicable law. See United States v. Remsing, 874 F.2d 614, 617 (9th Cir. 1989) (citing Orand v. United States, 602 F.2d 207, 208 (9th Cir. 1979)). The magistrate judge's conclusions of law are subject to de novo review. Barilla v. Ervin, 886 F.2d 1514, 1518 (9th Cir. 1989) (Citing Britt v. Simi Valley Unified Sch. Dist., 708 F.2d 452, 454 (9th Cir. 1983)).

The court is not bound to adopt the magistrate's findings and recommendations; on the contrary, the court must exercise "sound judicial discretion" in making its own

determination on the record.[1/] United States v. Raddatz, 447 U.S. 667, 675-76 (1980). The court may accept, reject, or modify, in whole or in part, the magistrate's findings or recommendations. 28 U.S.C. § 636(b)(1)(C); Remsing, 874 F.2d at 617.

Non-dispositive pretrial motions referred to the magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(A), on the other hand, are reviewed under a clearly erroneous or contrary to law standard. See 28 U.S.C. § 636(b)(1)(A); Local Rule 303(f); Raddatz, 447 U.S. at 673. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

[1/] Plaintiffs argue that the district court should give heightened deference to the magistrate judge's findings because they involve a large public institution that he has been overseeing for a long period of time. Such deference, however, is appropriate when an appellate court reviews a district court contempt finding for abuse of discretion. See Stone v. City & County of San Francisco, 968 F.2d 850, 856 (9th Cir. 1992), cert. denied, 122 L. Ed. 2d 358 (1993); Hutto v. Finney, 437 U.S. 678, 688 (1978). Because the standard for adoption of findings and recommendations under 28 U.S.C. § 636(b)(1) is not abuse of discretion, this principle does not apply.

III.

ANALYSIS

A. Introduction

The matter properly before the court for resolution is limited to civil contempt. The Certified Facts and Recommendations presented for review were submitted by the magistrate judge pursuant to reference of plaintiffs' motion. That motion sought a finding of civil contempt and various civil penalties. Accordingly, I now review the findings and recommendations as to civil contempt and related non-punitive enforcement remedies only. As explained at the hearing on October 3, 1994, plaintiffs' more recent requests for initiation of criminal contempt proceedings based on the same findings, and for imposition of Rule 11 sanctions, shall be denied without prejudice.[2/]

[2/] Whereas civil sanctions prospectively compel compliance with existing orders, criminal penalties punish past acts of disobedience. United Mine Workers v. Bagwell, 129 L. Ed. 2d 642, 652 (1994); Whittaker Corp. v. Execuair Corp., 953 F.2d 510, 517 (9th Cir. 1992). Criminal contempt proceedings require many of the same procedural safeguards as other criminal prosecutions, and therefore may not be simply bootstrapped onto civil contempt proceedings. Plaintiffs recognize that, although the same violations may give rise to both civil and criminal sanctions, separate proceedings are necessary. It appears to the court that multiplication of proceedings at this time will only hinder the compliance process. Should the remedial orders set forth herein fail to achieve their goals, however, further

(continued...)

As plaintiffs conceded at hearing, further escalation of adversarial hostility between the parties to the Consent Decree can only undermine the critical need for swift remedial action to provide adequate psychiatric care to CMF inmates.

It is absolutely clear to this court that defendants have repudiated their responsibilities under the Consent Decree, and engaged in a four-year pattern of delay and obstruction regarding the planning and implementation of a satisfactory OPP. The magistrate judge's particular factual findings supporting this conclusion are reviewed below. Defendants' history of non-cooperation with plaintiffs, the Mediator, and the magistrate judge indicates that the existing process for achieving and measuring compliance with section V.F. cannot remedy the existing violations of the Decree without district court intervention.

This court has heretofore exercised great restraint, on the belief that the state's prison officials rather than a federal district court must administer the state's prisons, and that consent decrees should be consensually administered. Nonetheless, by entering the Consent Decree, defendants assumed legally binding obligations to the plaintiff class that may not be breached with impunity or by disingenuous post-hoc appeals to judicial restraint. Four years of delay and non-compliance is simply inexcusable, and warrants more intrusive orders of enforcement. See, e.g., Spallone v. United States, 493

[2/](...continued)
and more drastic measures may become necessary. The court will not hesitate to vindicate its authority in the face of willful disobedience.

U.S. 265, 280 (1990); Stone v. City & County of San Francisco, 968 F.2d 850, 861 (9th Cir. 1992), cert. denied, 122 L. Ed. 2d 358 (1993) (increasingly stringent remedial measures necessary if prior orders ineffective).

The State of California, at the hearing on this motion, specifically requested judicial guidance on three questions central to ongoing compliance disputes: (1) what is a Plan of implementation for the OPP that is adequate under the decree? (2) what standard governs assessment of the adequacy of actual care and treatment under section V.F.? (3) what monitoring mechanisms should be adopted for gauging compliance? Defendants stated their intention to comply with the orders of the court regarding these matters, reserving only the right to seek appellate review.

Accordingly, I now address the findings and recommendations of the magistrate judge and the related issues of Consent Decree interpretation and enforcement that are presented by the motion.

B. The Magistrate Judge's Findings of Fact

The Facts certified by the magistrate judge fall into two general categories. First, there are findings that defendants repeatedly missed deadlines for particular actions found appropriate by the Mediator and ordered by the magistrate judge and/or district judge.[3/] Defendants

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[3/] The following deadlines and requirements were not met without prior extensions of time: (1) the original June 30, 1990, deadline for operational OPP; (2) the extended implementation deadline of October 31, 1990; (3) subsequent staffing deadlines set by Orders of 3/8/91

(continued...)

do not dispute that these deadline orders were technically violated.[4/] Second, the magistrate judge made numerous findings of fact regarding conditions for psychiatric patients at CMF during the life of the Decree. These facts go to defendants' alleged violation of their obligation to provide "appropriate psychiatric evaluation and treatment for all inmates at CMF as medically indicated."

Certified Facts 1 through 12, 14 through 19, 24 and 25 set forth the relevant procedural history of Consent Decree implementation and contempt proceedings. This court has reviewed this summary and finds it accurate. The magistrate judge incorporates numerous previous factual findings and determinations of non-compliance presented by the Mediator in his regular Progress Reports which were adopted by my previous Orders. Because defendants did not object to these findings when originally submitted, the magistrate judge properly treated them as established and defendants may not challenge them here.

[3/](...continued)
and 5/28/91; (4) Orders to work with mediator to revise auditing instrument (9th Mediator's Progress Report ("Report") at 50, by Order of 9/2/92; 13th Report at 60, by Order of 1/28/94); (5) October 1, 1992, deadline for HIV and Intensive Treatment Unit program descriptions; (6) January 1, 1993, deadline for same; (7) April 15, 1993, deadline for Transitional Outpatient Care, Partial Outpatient Care and Maintenance Outpatient Care program descriptions and action plans.

[4/] Defendants argue that they did submit the various required documents, though late, and that subsequent disputes as to the adequacy of those plans and reports are not relevant as the Orders addressed only production.

See Stone, 968 F.2d at 858.

Any and all objections to Facts 1 through 12, 14 through 19, 24, and 25 are rejected for these reasons.

Certified Fact 13 deals with the July 3, 1991, heat stroke deaths of three CMF inmates. Investigations following this tragedy determined that the deaths were caused in part by the combined effects of high temperatures and psychiatric medications which obstructed normal regulation of body heat.[5/] While it is true that the Consent Decree does not address, in terms, ventilation conditions and the availability of emergency cooling measures for at-risk inmates, factors implicated in the deaths, it does not follow that defendant's objections to Certified Fact 13 are proper.

Appropriate medication monitoring is required under section V.F. Whatever the outer limits of the phrase, common sense, much less common decency, requires a reading of the Decree that defendants bound themselves to insure that they would take reasonable measures to insure that the provision of medications would not result in death by virtue of the exigencies of prison life. In effect, the magistrate judge's finding addresses defendants' failure to abide by the Decree. Accordingly, defendants' objection to this fact cannot be sustained.

Certified Facts 20 and 21 set forth the qualifications, observations and conclusions of Dr.

[5/] This finding resulted in the implementation of corrective measures approved by this court. Defendants have subsequently been found to be in compliance with those measures.

Vallabhaneni Meenakshi, former CMF Chief Psychiatrist. Dr. Meenakshi assessed defendants' December 1993 OPP Plan and the actual operation of the OPP as of December 1994, and found both to be clinically inadequate on numerous grounds. Defendants strenuously object to reliance on her declaration, arguing that only adverse evidence is credited by the magistrate judge. Defendants provide no grounds for doubting the accuracy of Dr. Meenakshi's observations or the validity of her expert opinions. No evidence contradicting her testimony was provided below. Defendants' ad hominem attack on the magistrate judge's neutrality is therefore unjustified and the objections are overruled.

Certified Facts 22 and 23 deal with inmate suicides at CMF. The magistrate judge cited nine suicides among inmates eligible for the OPP, eight of which occurred between September 1992, and May 1993. Three additional suicides have occurred between the filing of this contempt motion and hearing before the district court. See Bien Decl, filed September 19, 1994, at 11-12. Defendants argue that their suicide prevention plan is adequate and that no plan can successfully prevent all suicides, but they do not dispute the underlying facts regarding particular suicides.

Instead, defendants object to the magistrate judge's citation to the declaration of plaintiffs' counsel, which summarizes expert conclusions included in the medical files of the deceased inmates and/or reported by the Mediator following independent investigation. Having reviewed the evidence de novo, the court finds that plaintiffs' counsel accurately summarized admissible evidence, and that the magistrate judge's reference to this summary does not render the underlying evidence inadmissible or his conclusions of fact erroneous.

The record contains substantial credible evidence that, in various cases, prescribed medications were not administered, required precautionary measures were not taken, transfers from one unit to another were delayed, required evaluations were not timely conducted, and necessary documentation was missing from files. All of these failures of the OPP system involve treatment elements mandated by section V.F. of the Consent Decree.

Defendants submit the Declaration of Robert McGahey, CMF Suicide Prevention Coordinator, in opposition to the Findings and Recommendations. McGahey disputes plaintiffs' evidentiary arguments that these suicides were causally linked to any program failures. In rebuttal, plaintiffs submit further documentation by CMF staff and psychiatric experts of the particular clinical deficiencies identifiable for each case. See Bien Decl. at 2-9 and exhibits 1-5. The evidence before the magistrate judge and the additional evidence presented to this court demonstrate life-threatening inattentiveness to clinical indicators and inmate needs. I accordingly find that plaintiffs have presented clear and convincing evidence that the care provided at CMF, during the period of defendants' documented noncompliance with section V.F., has contributed to needless human suffering and loss of life.

The objections to Facts 22 and 23 regarding suicides are overruled. The evidence discussed above supports the magistrate judge's conclusion in Fact 26 that

> [W]hile defendants have delayed and procrastinated, inmates at California Medical Facility have suffered and died as a result of conditions which the Consent Decree, agreed to by the parties and ordered by the district court, was designed to correct.

Defendants' objection to this factual conclusion is also rejected.

Finally, defendants object to the magistrate judge's finding that their delays in implementing the OPP have been deliberate. Fact 26. The record of consistent disregard for deadlines, failure to cooperate with plaintiffs and the Mediator despite repeated findings of non-compliance, and overt defiance of the magistrate judge permit no other conclusion. Defendants have persisted in this pattern of procrastination and delay despite the threat of sanctions.[6/] The sheer number of delays in the face of such cautionary notice generates an inescapable inference of intentional conduct.

This conclusion is further buttressed by the letter of Corrections Director James Gomez, who challenges the viability of the Consent Decree process and indicates his disrespect for the court. See Fact 18. That disrespect is also reflected in defendants' briefs on this matter, which repeatedly impugn the integrity and neutrality of the magistrate judge. This court has the utmost faith in Magistrate Judge Moulds, and in Mediator Breed. Both have discharged their duties in this case with impressive care and thoroughness, and with sensitivity to the legitimate competing concerns of the parties. The "contempt" I must assess on this motion is a legal term of art whose technical requirements are discussed below. "Contempt" in its colloquial sense, however, is evidenced by the entire record before me. Although expressions of such a defiant attitude do not independently support civil penalties, they support the factual conclusion that defendants' conduct has been

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[6/] See Orders filed February 25, 1991, and May 28, 1991.

intentional.

Accordingly, for the reasons stated above, the magistrate judge's findings of fact are hereby approved and adopted in full.

C. The Magistrate Judge's Conclusion of Law Re: Civil Contempt

1. Preliminary Considerations

Before turning to the merits of the recommended contempt finding, I must address defendants' threshold objection that such a determination improperly abrogates the dispute resolution process established by the Consent Decree. Specifically, defendants argue that mediation of PV-A6, which also addressed compliance with section V.F., was improperly suspended by the Mediator in deference to the judicial proceedings. Accordingly, they argue, a contempt finding must await resumption and exhaustion of the mediation process.[7/]

This argument fails for several reasons. First, the Decree provides that in emergency situations any party may apply directly to the court for relief. Section IX.8. Defendants had ample notice of the contempt motion, and plaintiffs clearly allege therein that defendants' non-compliance threatens immediate and irreparable harm to class members. The requirements of section IX.8 are thus satisfied, and plaintiffs did not violate the Decree by

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[7/] Plaintiffs correctly counter that defendants' past failures to participate meaningfully in the dispute resolution process are the basis of the contempt motion, indicating the futility of such exhaustion.

seeking judicial relief. For the same reason, the Mediator did not act improperly by deferring proceedings on the perceived violation. Furthermore, defendants previously raised this issue in objection to the Mediator's Thirteenth Progress Report, and it was subsequently decided against them.[8/]

I now turn to the magistrate judge's recommendation that defendants be found in contempt of court on the basis of the certified facts. This is a legal conclusion that must be reviewed de novo. Barilla v. Ervin, 886 F.2d 1514, 1518 (9th Cir. 1989).

2. Applicable Law

District courts have inherent authority to enforce their orders. Spallone v. United States, 493 U.S. 265, 276 (1990). This power extends to the enforcement of consent decrees. S.E.C. v. Randolph, 736 F.2d 525, 528 (9th Cir. 1984). Civil contempt sanctions are one method of forcing

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[8/] The issuance of PV-A6 was reported in the Mediator's Eleventh Progress Report at 44. Each subsequent report has stated that the matter was unresolved and/or before the court on contempt. The Thirteenth Report specifically stated that action on the perceived violation was being deferred because of the contempt proceeding. Thirteenth Report at 63. Defendants filed objections to the Report which included objection to the propriety of such deference. The objections were referred to the magistrate judge for findings and recommendations, and he recommended adopting the Report with certain modifications which did not include the status of PV-A6. Defendants did not object to the findings and recommendations, which were adopted by Order of this court filed January 28, 1994.

compliance. United States v. United Mine Workers of America, 330 U.S. 258, 293-94 (1947); Whittaker Corp. v. Execuair Corp., 953 F.2d 510, 517 (9th Cir. 1992). Generally, the minimum sanction necessary to obtain compliance is to be imposed. Id. (citing Spallone, 493 U.S. at 280).

A party may be held in contempt when he

> [W]illfully disobeys a specific and definite order requiring him to do or to refrain from doing an act. A person fails to act as ordered by the court when he fails to take all the reasonable steps within his power to insure compliance with the court's order.

Shuffler v. Heritage Bank, 720 F.2d 1141, 1146 (9th Cir. 1983).

The standard of proof for civil contempt is clear and convincing evidence. Whittaker Corp., 953 F.2d at 518; Falstaff Brewing Corp. v. Miller Brewing Corp., 702 F.2d 770, 770 n.1 (9th Cir. 1983). The moving party has the burden of showing that the contemnors have violated a specific and definite order of the court; the burden then shifts to the contemnors to demonstrate that they were unable to comply. Stone v. City and County of San Francisco, 968 F.2d 850, 856 n.9 (9th Cir. 1992), cert. denied, 122 L. Ed. 2d 358 (1993) (citing Balla v. Idaho, 869 F.2d 461, 466 (9th Cir. 1989), and Donovan v. Mazzola, 716 F.2d 1226, 1240 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984)). A party's intent in disobeying a court's order is not relevant to a finding of civil contempt. In re Crystal Palace Gambling Hall, Inc.,

817 F.2d 1361, 1365 (9th Cir. 1987).

Substantial compliance with a court's order is a defense, however, and contempt is inappropriate where a party has taken "all reasonable steps" to comply with an order. Nat'l Advertising Co. v. City of Orange, 861 F.2d 246, 250 (9th Cir. 1988). Defendant bears the burden of production. United States v. Rylander, 460 U.S. 752, 757 (1983). That burden is one of showing "categorically and in detail" that compliance is impossible. United States v. Rylander, 656 F.2d 1313 at 1318 (9th Cir. 1981), rev'd on other grounds, 460 U.S. 752 (1983). The ultimate burden of persuasion remains on the plaintiff, but what may be required to sustain the burden varies according to the evidence produced by the defendant.

3. Past Violations of Specific Orders

Defendants' repeated past failures to meet deadlines for particular actions suggested by the Mediator and ordered by the magistrate judge or the district court[2/] clearly constitute violations of specific and definite orders. Balla, 869 F.2d at 465. Completed past acts of disobedience, which are not remediable by prospective compliance, are the purview of criminal rather than civil contempt. See Whittaker, 953 F.2d at 517-18. In most instances identified above, defendants submitted the required reports or took specified actions after the applicable deadlines. Accordingly, there remains no concrete action to compel via civil sanctions. Any outstanding non-compliance involves the substantive adequacy of defendants' submissions and actions, which is

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[2/] See footnote 3, supra.

discussed in the subsequent section.[10/]

Although these completed past violations do not independently support a contempt finding, they do provide evidence relevant to a finding of present contempt for ongoing violations. Stone, 968 F.2d at 857. Defendants' historical pattern of delay and disregard for the Consent Decree process provides the context for analysis of their failure to comply with their substantive obligations under the Decree.

4. Ongoing Violation of Fundamental Consent Decree Obligations

Plaintiffs have established by clear and convincing evidence that defendants have not provided and are not now providing "appropriate psychiatric evaluation and treatment for all inmates at CMF as medically indicated." They are therefore in fundamental ongoing violation of the Consent Decree, which is an enforceable order of the court.[11/] Stone, 968 F.2d at 856. While this finding is

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[10/] For example, plaintiffs identify as a specific violation defendants' late response to the April 15, 1993, deadline for various program descriptions. Defendants submitted, after the deadline, a single description for the three programs. Plaintiffs argue that this response fails to satisfy the Order because it is "too little, too late." See Fact 15.

[11/] The facts discussed supra establish not only violations of the general mandate regarding appropriate care and an adequate OPP, but the particular requirements of appropriate medication monitoring, evaluations, recordkeeping, etc. See Sections V.F.2 & 3.

independently supported by the expert opinions of Drs. Yarvis and Meenakshi cited by the magistrate judge, and by the data regarding inmate suicides discussed above, it has also been previously established by this court's adoption of 14 consecutive Progress Reports concluding that defendants are not in compliance with section V.F.[12/]

The question is whether the relevant terms of the Decree itself are sufficiently definite that their violation can support a contempt finding. See Balla, 869 F.2d at 465. In Balla, the Ninth Circuit noted[13/] that a skeletal injunction requiring "sufficient" mental health staffing and "basic" suicide prevention measures at a state prison was too vague to be enforced in contempt. Id. Defendants argue that Balla precludes a contempt finding in this case because the terms of the Consent Decree are equally vague. This contention must be rejected.

Plaintiffs suggest that Balla does not apply because the order violated here is a Consent Decree rather than an injunction. This difference does not necessarily distinguish the case analytically. The very availability of contempt turns on the fact that a Consent Decree approved and entered by the court is a judgment enforceable in all the same ways as an injunction or other remedial order.

[12/] See Reports 3-16.

[13/] I observe that Balla's specificity discussion is dicta, as the court determined that the "vague" injunction was not the operative order against which to judge defendants' compliance. It is well settled, however, that civil contempt is appropriate only when a party fails to comply with a court order that is sufficiently specific. See Gifford v. Heckler, 741 F.2d 263, 265 (9th Cir. 1984).

S.E.C. v. Randolph, 736 F.2d 525, 528 (9th Cir. 1984).

Nonetheless, consent decrees and judicially-crafted decrees are subject to different rules of interpretation, reflecting the fact that the terms of the former are embodiments of the mutual intent of the parties while the terms of the latter are externally imposed. See Jeff D. v. Andrus, 899 F.2d 753, 759 (9th Cir. 1989) (principles of contract interpretation govern construction of consent decrees); United States v. 60.22 Acres of Land, 638 F.2d 1176, 1178 (9th Cir. 1980), cert. denied, 451 U.S. 985 (1981) (construction of judicial decrees gives effect to intent of issuing court). This difference becomes relevant to the specificity inquiry because, as I now explain, the underlying concern is one of fair notice regarding the meaning of the decree.

The specificity doctrine regarding contempt was enunciated in Int'l Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n, 389 U.S. 64 (1967). In that case, the Supreme Court struck down both an injunction and a subsequent contempt order on the grounds that the injunction was not sufficiently specific. The Court observed that the injunction "contain[ed] only an abstract conclusion of law, not an operative command capable of 'enforcement.'" Id. at 74. In oft-quoted language, the Court explained:

> The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid.

> Because the decree of this District Court was not so framed, it cannot stand. And with it must fall the District Court's decision holding the union in contempt. We do not deal here with a violation of a court order by one who fully understands its meaning but chooses to ignore its mandate. We deal instead with acts alleged to violate a decree that can only be described as unintelligible. The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension.

Id. at 76.

The due process concerns suggested by this passage underlie the continued application of injunctive relief standards for specificity in the contempt context. See Schmidt v. Lessard, 414 U.S. 473 (1974) (per curiam) (order failing to satisfy Fed. R. Civ. P. 65(d) cannot be enforced via contempt); Portland Feminist Women's Health Center v. Advocates for Life, 859 F.2d 681 (9th Cir. 1988) (same). Schmidt and its progeny stand for the proposition that a person cannot fairly be penalized for conduct that he could not have known was proscribed. See Portland Feminist Women's Health Center, 859 F.2d at 685; New York State Nat'l Organization for Women v. Terry, 886 F.2d 1339, 1351 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990); United States v. O'Quinn, 913 F.2d 221, 222 (5th Cir. 1990) (per curiam); Project BASIC v. Kemp, 947 F.2d 11, 17 (1st Cir. 1991).

In the matter at bar, defendants had ample and repeated notice that their conduct violated the Decree. Fourteen separate orders of this court over a three-year

period adopted findings of non-compliance with the provisions at issue here.[14/] Thus, defendants' campaign of stonewalling behavior cannot be construed as innocent conduct which breached an invisible or unascertainable boundary. See, Portland Feminist Women's Health Center, 859 F.2d at 685 (rejecting argument that defendants could not tell when noise at demonstration rose to level violating injunction); cf. Project BASIC, 947 F.2d at 16 (no contempt finding against party who did not have fair notice that it was bound by order).

Defendants insist that the inherent generality of the Consent Decree's terms, such as "appropriate treatment," renders the Decree vague and therefore unenforceable as a matter of law. This argument fails for several related reasons. First, as I have already explained, the due process concern for fair notice of violation is satisfied on the facts of this case. Second, because the phrases at issue were mutually agreed upon by the parties, and defendants have never sought their modification, the objections as to vagueness are disingenuous.

In a subsequent section of this Order, I interpret section V.F. as establishing a clinical standard of care by its plain language, which is the operative measure of the parties' intent. See Thompson v. Enomoto, 915 F.2d 1383, 1388 (9th Cir. 1990), cert. denied, 117 L. Ed. 2d 131 (1992) (applying California contract law to interpretation of consent decree). Having consented to a standard of adequacy explicitly based on clinical norms, defendants cannot credibly maintain that they have been unaware of the applicable standard or that its parameters

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[14/] See Orders adopting Mediators Reports 3 through 16, filed between February 25, 1991, and June 8, 1994.

have been unascertainable. The expert opinions on which the historical findings of non-compliance have been based have always been provided to defendants, and the concomitant recommendations for achieving compliance have been as regularly ignored.

Finally, defendants may not avoid a finding of contempt by arguing that the Decree itself does not concretely identify what actions are required for compliance. Their non-compliance has not only been a matter of record, but has been willfully maintained. The conduct at issue is not simply failure to reach an indefinite goal, but defiant adherence to conduct and conditions constituting a declared ongoing violation. The court is confronted not with a defendant whose violation falls at the uncertain margins of a vague decree, but one who has refused to cooperate with opportunities for consensually remedying a core violation.

In the analogous context of "void for vagueness" challenges to penal statutes, "hard core" violators may be permissibly punished even if marginal violations cannot be identified with certainty under the statutory language. Smith v. Goguen, 415 U.S. 566, 577-78 (1974); see also Schwartzmiller v. Gardner, 752 F.2d 1341, 1345-46 (9th Cir. 1984). The constitutional void for vagueness doctrine turns on the same fairness concerns that animate vagueness analysis in the contempt context. See Portland Feminist Women's Health Center, 859 F.2d at 687 (same due process principles of notice and warning underlie both doctrines). Because void for vagueness analysis arises in the context of potential criminal penalties, where due process protections are most stringent, its application by

analogy here cannot prejudice defendants.[15/]

Like the hard-core violator of an arguably vague statute, defendants have engaged in conduct that indisputably violates the consent decree. The precise demarcation between compliance and non-compliance under section V.F. is simply not presented by the facts found infra, which portray persistent and egregious violations both regarding OPP implementation and regarding good faith participation in the dispute resolution process. Defendants may not assert the vagueness of the decree as to compliance measures they have not taken to escape a contempt finding based on that refusal.

I conclude that defendants' deliberate and persistent refusal to remedy identified violations is within the "hard core" of contempt of the Consent Decree, and therefore may support civil remedies to coerce compliance.

[15/] The void for vagueness doctrine is aimed in part at preventing the evil of arbitrary law enforcement by police and prosecutors, while the specificity requirements for contempt provide limits to judicial power. See Portland Feminist Women's Health Center, 859 F.2d at 687. Insofar as relevant here, however, the principles and the rights they protect are the same.

In Portland Feminist Women's Health Center, the Ninth Circuit addressed parallel challenges to a contempt order under Schmidt v. Lessard (specificity of injunction), and Smith v. Goguen (void for vagueness), noting the analytical symmetry of the doctrines. Id. Although this court has found no prior applications of the hard-core violator concept to the contempt context, I am persuaded that underlying due process principles and the notice of terms inherent in the Consent Decree context warrant this application by analogy.

5. Defendants' Substantial Compliance Defense

Defendants argue that a finding of contempt is precluded because CMF is now in substantial compliance with its 1990 OPP Plan. This argument fails for two reasons. First, compliance with the superseded 1990 OPP Plan does not measure compliance with the Consent Decree.[16/] Second, defendants rely on compliance ratings produced by the Office of Inspector General ("OIG") audits which do not measure the actual adequacy of OPP elements as implemented, and therefore also fail to assess substantial compliance with the Decree.[17/]

Defendants also argue that their OPP must be

[16/] While plaintiffs err in asserting that the 1990 Plan was "abandoned," it is correct that all parties have acknowledged its shortcomings and the need for a new Plan to satisfy the Consent Decree. The Certified Facts and reports referenced therein document defendants' failure to produce such a revised plan until ordered to do so by the magistrate judge in the course of these contempt proceedings. Even then, defendants repeated their pattern of refusing to make recommended changes when their initial submission was deemed inadequate.

[17/] The Mediator has repeatedly identified the OIG auditing instrument as inadequate to assess the quality of care. See 4th Report at 64; 9th Report at 47; 11th Report at 47; 13th Report at 58, 16th Report at 40. The Mediator has attempted to gain defendants' cooperation in devising alternative monitoring mechanisms which will measure substantive compliance. Defendants have thus far refused to cooperate.

deemed in substantial compliance with the Consent Decree in the absence of a showing of criminal recklessness. See Farmer v. Brennan, 128 L. Ed. 2d 811 (1994) (defining "deliberate indifference" standard for Eighth Amendment violations). As I explain more fully below, the Eighth Amendment does not provide the benchmark for compliance with the Consent Decree. This argument is frivolous.

The various constructive actions taken by defendants under the Decree do not support a finding of substantial compliance. The record establishes that each such positive step followed repeated failures to meet obligations under the Consent Decree.[18/] Substantial compliance requires a showing that defendants took "all reasonable steps" to comply. Nat'l Advertising Co. v. City of Orange, 861 F.2d 246, 250 (9th Cir. 1988). I have already found defendants' pattern of delay and defiance to have been willful. While the numerous violations of particular task and deadline orders may not independently support a finding of contempt, they provide clear and convincing evidence that defendants have not taken "all reasonable steps within their power to insure compliance" with the Consent Decree. See Sekaquaptewa v. MacDonald, 544 F.2d 396, 406 (9th cir. 1976), cert. denied, 430 U.S. 931 (1977); Toussaint v. McCarthy, 597 F. Supp. 1427, 1430 (N.D. Cal. 1984), aff'd in part, rev'd in part on other grounds, 801 F.2d 1080 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987) (history of delay establishes that respondents did not act with reasonable dispatch).

[18/] For example, the 1992 creation of an Implementation Team followed an OIG finding of 12% compliance and a Mediator's Report finding unjustified delay. Facts 11 and 12.

For all the above reasons, defendants' defense of substantial compliance is without merit, and the magistrate judge's conclusion that they should be found in contempt is adopted by this court.

D. Enforcement of Section V.F. of the Consent Decree

Before considering the appropriate remedy for contempt, I turn to general questions of prospective enforcement. Because I must impose the minimum sanction necessary to obtain compliance, Spallone, 493 U.S. at 280, I now address three unresolved issues which have impeded implementation.

The Consent Decree requires both development of an adequate OPP Plan and subsequent provision of actual OPP services which are appropriate. Ongoing disputes as to what affirmatively constitutes an adequate Plan, how appropriate care and treatment are to be measured, and how compliance is to be monitored have not been successfully resolved through the informal mediation process, as anticipated by the Consent Decree. Defendants have used these purported ambiguities as excuses for persisting in conduct which has explicitly been found non-compliant, and for refusing to cooperate in good faith with the very process designed to provide specific content to the terms of the Decree.

Accordingly, and pursuant to the invitation of the parties at the hearing, I now provide the guidance necessary for enforcement of obligations under the Consent Decree.

1. The Standard for Adequate Psychiatric Care Under the Consent Decree

In their arguments on this motion, defendants maintain that the actual adequacy of OPP care and treatment under the Consent Decree should be measured by Eighth Amendment standards. They insist that they cannot properly be found out of compliance or in contempt unless it is proved that OPP conditions violate constitutional minima. Defendants have asserted the applicability of Eighth Amendment standards throughout the life of the Consent Decree, despite this court's explicit rejection of that standard on the particular issue of staffing levels.[19/] Because the law as to interpretation of consent decrees is clear, and has been previously explained by this court, defendants' argument is frivolous.

It is well established that consent decrees are governed by principles of contract interpretation. See Thompson, 915 F.2d at 1388; Jeff D. v. Andrus, 899 F.2d at 759. Here, the Eighth Amendment was the basis of the original complaint, and would therefore have provided the parameters for a judicially-crafted remedial order. A consent decree, however, can go beyond the remedy that the court could have imposed, and the parties are thereafter bound by its terms. See Stone, 968 F.2d at 857, 861 n.20 (applicable consent decree rather than Eighth Amendment provides standards for jail conditions). The substantive

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19/ See Order filed October 9, 1992 (defining "adequate" staffing levels as required by the Consent Decree, and explaining that contract principles rather than Eighth Amendment standards govern interpretation of the Decree).

terms of the Consent Decree are not subject to reconsideration in connection with contempt proceedings. See Rylander, 460 U.S. at 756 (validity and terms of original order may not be challenged in contempt proceedings).

For these reasons, the standard applicable to adequate psychiatric care in this case is to be determined by the language of the Decree. See Thompson, 915 F.2d at 1388 (contract law of situs state applies); Cal. Civ. Code § 1638 (language of contract governs if clear and explicit). Section V.F.1. provides that defendants shall provide "appropriate" psychiatric evaluation and treatment "as medically indicated" (emphasis added). This language clearly establishes a clinical standard for appropriate mental health care generally and for the adequacy of particular OPP elements, which are specified components of such care. See Sections V.F.2 & 3.

The phrase "as medically indicated," as commonly understood, denotes care and treatment according to professional standards responsive to diagnostic criteria. The Decree by its terms affirmatively obligates defendants to provide treatment according to clinical psychiatric norms, rather than merely refraining from the deliberate indifference forbidden by the Eighth Amendment. See McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992) (Constitution forbids wanton infliction of pain through deliberate indifference to serious medical need).

All future determinations of compliance with the general "appropriate evaluation and treatment" provisions of section V.F., including the "appropriateness" of the various mandatory OPP elements specified in sections V.F.2 & 3, shall be made according to general clinical standards for the treatment of the psychiatric conditions at

issue. This standard governs both the adequacy of the OPP Plan and the adequacy of actual care and treatment to be provided under a fully implemented OPP.

2. An Adequate OPP Plan

As I have previously explained, the inadequacy of the original 1990 OPP Plan has long been conceded by all parties. Defendants have acknowledged the need for significant changes in the Plan since 1992, but did not produce a comprehensive revised Plan until ordered to do so by the magistrate judge pursuant to these contempt proceedings. The resulting December 1993 Plan was evaluated by the Mediator and his experts, and found inadequate to meet the goals and standards set forth in the Consent Decree. Defendants' 1993 OPP Plan and the Experts' Report proposing modifications are now before the court for consideration.

Also before the court is the August 1994 OPP Plan submitted by the Mediator pursuant to the Order of the magistrate judge. This Plan is based on defendants' 1993 Plan, modified to incorporate the experts' suggestions and provide greater overall specificity. The court is also in receipt of the responses of the parties to the Mediator's Plan. Before turning to the relative merits of the competing Plans, I must address defendants' preliminary objection to the magistrate judge's Order that the Mediator draft an OPP Plan for my consideration.

Because the magistrate judge's separate Order directing the Mediator to propose a Plan was ancillary to a specially referred matter, and itself non-dispositive, it is reviewed under the clearly erroneous standard. See 28 U.S.C. § 636(b)(1)(A); Local Rule 303(f). The Order is not itself dispositive of any issue before the court, and does

not purport to approve the Mediator's Plan. It merely establishes a procedural mechanism for executing the responsibilities assigned by this court's order of reference under 28 U.S.C. § 636(b)(1). Accordingly, the Order comes within the magistrate judge's general powers to conduct the proceedings and discharge the duties delegated to him. See Grimes, 951 F.2d at 236 (magistrate may issue non-dispositive orders in course of proceedings assigned to him under 28 U.S.C. § 636(b)).[20/]

Having concluded that the magistrate judge's Order was not contrary to law, I now turn to the matter before me. I initially note that the relative clinical merits of the competing OPP Plans is a question for doctors and not for the court. Accordingly, I rely on the declarations and prior testimony of the experts tendered by the parties and the report of the court-appointed experts who have consulted with the Mediator. I must decide which of the current Plans, if any, satisfies the terms of the Consent Decree as a matter of law. For the reasons explained more fully below, I conclude that the defendants' unmodified 1993 Plan is inadequate for implementation of the Decree and that the Mediator's Plan satisfies its requirements.

[20/] Grimes involved an order to show cause why sanctions should not be imposed for violation of a prior discovery order. It illustrates the unremarkable principle that magistrate judges may issue such scheduling, procedural, enforcement and other ancillary orders as are necessary to conduct the proceedings assigned to them by the district court.

Defendants' characterization of the Order as a "contempt order" beyond the magistrate judge's authority because issued within the scope of a contempt proceeding is baseless.

The Experts' Report on the defendants' 1993 OPP Plan sets forth 13 specified modifications which the court is advised to require before approving the Plan.[21/] Drs. Barter, Tupin, and Stewart, court-appointed expert psychiatrists under the Gates Decree, concluded that the Plan would not be clinically adequate without these changes. Defendants refused to voluntarily incorporate the modifications. The court finds the experts' evaluation to be credible and persuasive.

First, the experts rightly criticize the 1993 Plan's modification procedures, which provide for unilateral "administrative latitude." Because clinical criteria govern under the Decree, they may not be overruled by

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[21/] The Experts' Report recommends the following changes: (1) amendment of the OPP modification process to require approval by court-appointed experts rather than unilateral "administrative latitude;" (2) required evaluation of custodial staffing levels and possible increases; (3) required explicit incorporation of matters defendants deem "informally clarified;" (4) required explicit goals and programming standards for Category K inmates; (5) provision of a goal statement; (6) & (7) improved data collection processes for monitoring proposes; (8) & (9) provision of specific treatment and pharmacology protocols; (10) review and improvement of medication dispensing system; (11) review and possible increase of clinical staffing levels; (12) reclassification of Unit III as residential treatment or restructuring as a genuine outpatient component; (13) placement of HIV psychological services within the OPP.

administrative concerns.[22/] Legitimate considerations of prison administration can indeed warrant program modifications, but not at the expense of medical adequacy. The proposed requirement that changes meet the approval of independent experts guarantees that the Decree's clinical standards will be maintained, without improperly providing plaintiffs with veto power in areas implicating prison administration.

The court is also persuaded by the experts' overall insistence that the OPP Plan provide greater specificity regarding treatment protocols, programming norms, and monitoring mechanisms. In the past, defendants have pointed to the lack of explicit requirements in these areas as impediments to progress in OPP implementation. The Consent Decree contemplated that such details would be provided in the OPP Plan and refined in the mediation process. Defendants have historically obstructed the process of providing such content, then used the resulting "generality" as an excuse not to take all reasonable steps toward compliance. Specificity is required in order to break this cycle.

[22/] This is not to say that modes of delivery of medically-indicated psychiatric treatment should be unresponsive to the special needs of the correctional setting. Obviously, mental health care in a prison setting will not look exactly like that offered in a community-based setting. Factors related to prison administration will legitimately affect the structure and delivery of care. On the other hand, treatment decisions themselves may not be dictated by administrative concerns. Under the standard articulated above, evaluation and treatment must respond to clinical indicia and follow generally accepted clinical norms.

The Mediator's 1994 OPP Plan addresses these concerns. It is appropriate under the Decree because it starts from defendants' own proposal, incorporates the suggestions of the independent experts, and provides the greatest specificity. It also provides a modification procedure that prevents either party from imposing its own view of the optimal result. See United States v. Armour & Co., 402 U.S. 673, 682 (1971) (consent decree must be interpreted to effectuate the original intent of the agreement, not by reference to what would satisfy one of the parties to it).

Defendants have filed objections to the Mediator's Plan, supported by a Declaration from Dr. Richard Yarvis. Only one of the objections goes to the legal propriety of the Plan under the Consent Decree. Defendants correctly object to the 1994 Plan's reference to a "community" standard of care as the operative standard for OPP adequacy. Such a "community" norm is not to be found within the four corners of the Consent Decree, and therefore cannot govern its interpretation. See id. Furthermore, as Dr. Yarvis testifies, such a standard has no recognizable criteria in psychiatric literature or practice. Accordingly, it is too speculative to be enforced.

Defendants' other objections to the Plan address, in various particulars, the proper balance of clinical and prison administrative needs. Accordingly, these disputes are appropriate for resolution through the Plan's modification process rather than by judicial fiat.

Having concluded that the Mediator's Plan represents an adequate OPP Plan for purposes of the Consent Decree, I now consider my authority to order its adoption and implementation. Where a finding of contempt has been made, the court may exercise its broad equitable

remedial powers. Stone, 968 F.2d at 861. Accordingly, a remedial order following a contempt finding may include new requirements to serve the original intent of the Consent Decree. Id. at 859; see also Whittaker, 953 F.2d at 517-19. Where past order have failed to rectify the compliance problem, more intrusive measures are justifiable. Stone, 968 F.2d at 861.

Even in the absence of the contempt finding, an enforcement order mandating implementation of the Mediator's OPP Plan is warranted. As a general rule, non-compliance with the court's remedial orders provides a basis for further and more comprehensive equitable relief. Hutto v. Finney, 437 U.S. 678, 687 & n.9 (1978). Because this court retains jurisdiction of this case in order to enforce the Consent Decree, and its previous orders supporting the Mediator's remedial efforts have failed to achieve compliance, this equitable power is appropriately exercised. See also Toussaint v. Yockey, 722 F.2d 1490, 1494 (9th Cir. 1984) (district court may issue enforcement orders to effectuate prior orders regarding prison conditions).

Defendants object that imposition of the Plan is an impermissible modification of the Consent Decree.[23/] See

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[23/] This position is ironic in that defendants have also argued that the magistrate judge erred in failing to rule on their December 1993 Plan as a proposed modification. If defendants intended to move for modification, they must have been prepared to argue that changed circumstances warranted judicial adoption of a new OPP Plan even if such action constituted substantive modification of the Decree. In fact, defendants never brought a motion to modify the

(continued...)

Rufo v. Inmates of Suffolk County Jail, 116 L. Ed. 867, 883 (1992) (modification requires that standards of Fed. R. Civ. P. 60(b) be satisfied). First, an enforcement order adopting the Plan does not substantively alter the terms of the Decree and is therefore not a modification. See Stone, 968 F.2d at 859 (order imposing additional requirements does not modify consent decree where it secures compliance with original mandate rather than changing the legal relationship between the parties). Rather, the orders made herein interpret and enforce the existing terms and conditions of the Decree.

Second, even if substantive modification were required in order to implement a new OPP Plan, it would be warranted by defendants' past course of conduct. See Thompson, 915 F.2d at 1399 (district court has power to modify consent decree if experience with its administration shows need for modification in order to accomplish its primary goals). Here, adoption of the Mediator's Plan is necessary to achieve compliance with the Consent Decree. Such compliance is four years overdue. Defendants will not be permitted to create this dilemma by their own malfeasance and failure to act, and then object to the court's imposition of more intrusive remedies.

3. Compliance Monitoring

The parties and the Mediator agree on the need for a clearer process for OPP modifications and compliance

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[23]/(...continued)
Decree. Their 1993 Plan was not offered as a proposed modification, but submitted pursuant to court order. Now that the Plan under consideration is not their own, they insist that circumstances do not warrant modification.

monitoring. As already indicated, the Mediator's OPP Plan sets forth a workable process for resolving disputes over proposed modifications. The Plan provides a more thoroughly articulated version of the Consent Decree process, appropriate for application to this particular area of Decree implementation where the original process has irretrievably broken down.

The Plan also provides for the development of improved data collection procedures and auditing instruments to assess clinical adequacy. These matters are appropriately left to the process established by the OPP Plan.

E. Appointment of a Special Master

The magistrate judge recommends appointment of a Special Master for implementation of the new OPP Plan. The Federal Rules provide that the court may appoint a master in exceptional circumstances where detailed supervision of a case is necessary. Federal Rule of Civil Procedure 53(b) and Notes of Advisory Committee on 1983 Amendment. This case presents such exceptional circumstances. All the factors cited above which support a more intrusive enforcement order at this time also support appointment of a Special Master vested with the necessary powers to effectuate that order. See Toussaint v. McCarthy, 597 F. Supp. 1388, 1418 (N.D. Cal. 1984), aff'd in part, rev'd in part on other grounds, 801 F.2d 1080 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987); Thompson, 915 F.2d at 1399; Hutto, 437 U.S. at 687.

The Special Master will be appointed for the limited purposes of overseeing implementation of the 1994 OPP Plan and ensuring that defendants come into compliance with section V.F. of the Consent Decree. This

appointment does not permanently change the Consent Decree process, thus constituting a modification, but provides a temporary mechanism for achieving compliance with the existing terms of the Decree. See Stone, 968 F.2d at 859.

The magistrate judge recommends the appointment of the current Mediator, Allen Breed, as Special Master for OPP implementation. Mr. Breed, upon defendants' nomination, has ably served as Mediator under the Consent Decree since its inception. He is intimately familiar with conditions at CMF, with the contents of the Decree, and with the history of OPP implementation and compliance disputes. He has an excellent working relationship with the court-appointed psychiatrists, and is familiar with the relevant communities of medical and correctional experts. As a former prison administrator, Mr. Breed also has the necessary understanding of correctional imperatives.

For all these reasons, Mr. Breed is an appropriate choice for appointment as Special Master. The Court is confident that he will discharge these new duties with the same skill and integrity with which he has heretofore served as Mediator.

IV.

ORDER

Accordingly, for the reasons stated above, IT IS HEREBY ORDERED as follows:

1. The Certified Facts submitted by the magistrate judge are **APPROVED AND ADOPTED** in full;

2. Defendants are **ADJUDGED TO BE IN CIVIL CONTEMPT** of court on the basis of the Certified Facts approved herein, and shall be **SANCTIONED** in the amount of Ten Thousand Dollars ($10,000) per day for each day they remain out of compliance with section V.F. of the Consent Decree, or in violation of any Order of this court implementing or enforcing the Consent Decree;

3. Imposition of sanctions is **STAYED** conditioned upon compliance with the independently operative enforcement orders now set forth;

4. The Mediator's August 1994 OPP Plan is **ORDERED FILED** and is hereby **APPROVED AND ADOPTED**, with the following amendments, as necessary to achieve compliance with the Consent Decree:

a. The letter from Allen Breed dated October 10, 1994, correcting typographical errors, is incorporated into the Plan;

b. Modification # 1 of the Experts' Report filed herein on January 3, 1994, is incorporated into the Plan;

c. All references to a "community standard of care" are stricken;

5. The Plan **SHALL BE IMPLEMENTED**, at defendants' cost, with the following modifications and conditions:

a. The Mediator shall, within thirty (30) days of the effective date of this Order or as soon thereafter as possible, meet and confer with Dr. Richard Yarvis and other experts of the Mediator's choosing to review defendants' substantive objections to the OPP Plan

and discuss possible compromise terms. The Mediator shall make such revisions as may best accommodate the legitimate correctional concerns of defendants and the clinical requirements of the Decree;

b. The Mediator shall meet with defendants at the first opportunity to review the timelines set forth in the OPP Plan and hear objections thereto. Modifications to deadlines shall be made in accordance with the provisions of the Plan;

6. Allen F. Breed is hereby **APPOINTED SPECIAL MASTER** for implementation of the OPP Plan pursuant to Fed. R. Civ. P. 53, as specified herein:

a. The Master shall retain all powers and duties as Mediator under the Consent Decree, and additionally shall have the powers and duties set forth in the 1994 OPP Plan;

b. The Master shall undertake the outstanding reviews specified at page 12 of the Plan within one hundred twenty (120) days of the effective date of this Order, and shall make adjustments to the Plan as indicated;

c. The Master shall have the power to modify deadlines in the OPP Plan upon the timely advance request of a party and after hearing any objections by the opposing party;

d. The Master shall report on the progress of OPP implementation every ninety (90) days. These reports may be included in the Mediator's quarterly Consent Decree Progress Reports;

e. The Master shall promptly certify

violations of OPP Plan deadlines or substantive provisions to the district court;

f. When the Master determines that the Plan has been fully implemented and the OPP is fully operational in compliance with the Consent Decree and this Order, he shall promptly certify this finding to the district court. Upon such certification, either party may move for termination of the appointment of a Master;

7. The Special Master shall certify any failure to comply with a deadline or a substantive requirement of the Plan directly to the district judge. Such a report will result in the issuance of an Order to Show Cause before the district judge why sanctions should not become immediately due from the date of the certified violation until compliance with the violated provision is certified by the Master;

8. Upon the Special Master's certification that the OPP is fully implemented and operating in compliance with the Consent Decree, defendants may move for an order finding that they have purged their contempt, and vacating all stayed penalties. Upon issuance of such an order, oversight of section V.F. compliance will return to the normal dispute resolution process set forth in the Consent Decree, under supervision of the Mediator. The enforcement order will remain in effect as to maintenance, monitoring, and evaluation of the OPP pursuant to the 1994 Plan;

9. The court at this time, and without prejudice, declines to initiate criminal contempt proceedings and denies Rule 11 sanctions.

IT IS SO ORDERED.

DATED: October 27, 1994.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT
COURT

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAY LEE GATES, et al.,	)	
	)	
Plaintiffs,	)	No. CIV
	)	S-87-1636
v.	)	LKK-JFM
	)	
GEORGE DEUKMEJIAN, et al.	)	
	)	CONSENT
Defendants.	)	DECREE
	)	

Filed
Dec. 8, 1989

I. INTRODUCTION

1. The Amended Complaint - Class Action was filed on January 6, 1988 pursuant to 42 U.S.C. section 1983 on behalf of eight inmates representing all inmates confined at the California Medical Facility - Main and the Northern Reception Center (hereafter CMF).

2. The Amended Complaint alleged that defendants had violated the Eighth and Fourteenth Amendments to the United States Constitution by subjecting plaintiffs and class members to deficient conditions of confinement, by denying them access to medical and mental health care, by depriving them of access to attorneys, and by segregating those class members who were infected with the human immunodeficiency virus (HIV).

3. Defendants filed a timely answer which

denied these allegations on January 27, 1988.

4. This action was certified as a class action on May 13, 1988, defining the class as follows:

> All inmates who are or will be confined at the California Medical Facility - Main (CMF-Main) and the Northern Reception Center (NRC). Inmates at CMF-Main include those confined to the "AIDS Wing," or "Special Housing Unit" ("SpHU"). Inmates at the California Medical Facility - South are specifically excluded from the class.

5. A Second Amended Complaint was filed on March 10, 1989.

6. The Second Amended Complaint alleged the same causes of action as the Amended Complaint, but added claims on behalf of handicapped inmates representing a class of inmates who plaintiffs alleged had been discriminated against on the basis of their handicaps in violation of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. section 794 (hereafter section 504).

7. The Court created a subclass of HIV-infected inmates housed in the Special Housing Unit (SPU) at CMF on March 10, 1989.

8. Defendants filed a timely answer which denied these allegations on March 20, 1989.

9. The action was recertified as a class action on May 17, 1989 to include the section 504 claims of mobility-impaired inmates confined to wheelchairs, mentally ill inmates, and HIV-infected inmates.

10. The Court has jurisdiction over the parties and subject matter of this action.

11. The defendants named in the Second Amended Complaint are George Deukmejian, Governor of the State of California, Joseph G. Sandoval, Secretary of the Youth and Adult Correctional Agency, James Rowland, Director of the Department of Corrections, Nadim Khoury, M.D., Assistant Deputy Director - Health Services, Eddie Ylst, Warden - CMF, Kenneth Shepard, M.D., Chief Deputy Warden for Clinical Services - CMF, Nicholas Poulos, M.D., Chief Physician and Surgeon - CMF, V. Meenakshi, M.D., Chief Psychiatrist - CMF, H. Benton, M.D., Chief Psychiatrist - NRC, Douglas G. Arnold, Deputy Director of the Department of Mental Health, D. Michael O'Connor, M.D., Director, Department of Mental Health, and Sylvia Blount, R.N., Executive Director - DMH Vacaville Psychiatric Program, all sued in their official capacities.

12. Governor George Deukmejian is dismissed as a defendant.

13. Joseph G. Sandoval is dismissed as a defendant.

14. Nicholas Poulos, M.D. is no longer employed as Chief Physician and Surgeon - CMF. Daniel E. Thor, M.D. his successor in office, is substituted for purposes of compliance with the provisions of this Consent Decree.

15. V. Meenakshi, M.D. is no longer employed as the Chief Psychiatrist for the Outpatient Psychiatric Program - CMF. Paul Morentz, M.D., her successor in office, is substituted for purposes of compliance with the

provisions of this Consent Decree.

16. H. Benton, M.D. is no longer employed as Chief Psychiatrist - NRC. Bruce Baker, M.D., is acting in that capacity pending appointment of a successor in office who will be substituted for purposes of compliance with the provisions of this Consent Decree.

17. D. Michael O'Connor, M.D. is no longer employed as the Director of the Department of Mental Health. Defendant Douglas G. Arnold is acting in that capacity pending appointment of a successor in office who will be substituted for purposes of compliance with the provisions of this Consent Decree.

18. Douglas G. Arnold is no longer employed as Deputy Director for State Hospitals - DMH. Clyde Murrey, his successor in office, is substituted for purposes of compliance with the provisions of this Consent Decree.

19. Defendants agree that this Consent Decree is binding on them and their agents, employees, successors, and assigns.

20. The parties agree that actions alleged in the Second Amended Complaint implicate rights secured and protected by the United States Constitution and by section 504 of the Rehabilitation Act of 1973, as amended. Recognizing these constitutional and statutory interests and for the purpose of avoiding the continuation of expensive, protracted and adversarial litigation, the parties agree to the provisions set forth in this Consent Decree.

21. The parties agree that in entering into this Consent Decree they waive specific findings of fact and conclusions of law and any determination whether the

remedies provided are legally required.

22. By entering into this Consent Decree, defendants do not admit any violation of law.

23. The provisions of this Consent Decree may not be used as evidence of any violation of law in any other proceeding, except enforcement proceedings in this case.

24. The provisions of this Consent Decree are a fair and equitable resolution of the claims of plaintiffs and the class members in this action.

25. The parties agree that it is not the intent of this Consent Decree to prescribe the minimum standards required by the United States Constitution. The provisions of this decree do not, in whole or in part, themselves create any liberty interest in plaintiffs that is enforceable under the Fourteenth Amendment.

II. DEFINITIONS

As used in this Consent Decree, the following terms will have the meanings set forth herein, unless specifically stated otherwise:

1. "California Medical Facility" (CMF) means the California Medical Facility - Main (CMF-Main) and the Northern Reception Center (NRC), but excluding the California Medical Facility - South (CMF-South).

2. "Physical therapy aides" presently means Medical Technical Assistants (MTA's) or inmates who are providing physical therapy services under supervision and pursuant to an approved vocational training program.

3. "Psychiatric classifications" presently means inmates in Categories I, J, K, U, T, Psychiatric Attention, and Psychiatric Evaluation.

4. "Clinician or clinical staff," for purposes of Part V (Mental Health Care) of this Consent Decree, means a psychiatrist, psychologist, or licensed social worker trained in psychological evaluation and diagnosis.

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

III. MEDICAL CARE ISSUES

1. Defendants will develop written treatment guidelines which are approved the Medical Executive Committee at CMF for the following medical conditions:

a. Asthma
b. Seizure disorders
c. Obstructive lung disease
d. Tuberculosis
e. HIV disease, including dental care
f. Rental disease
g. Liver disease
h. Diabetes mellitus
i. Cardiovascular disease, including hypertension.

Plaintiffs may provide defendants with recommendations regarding the treatment guidelines to be developed. The parties agree that the treatment guidelines are advisory and that they are not intended to control the exercise of professional judgment by a physician in his or her treatment of a particular patient.

2. The written treatment guidelines referred to in Part III, paragraph 1, above, will include and emphasize criteria that will assist the attending physician in determining when a patient should be transferred for further treatment to a hospital accredited by the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO) which is appropriately staffed and equipped to care for patient with one or more of the medical conditions set forth in Part III, paragraph 1, above.

3. The treatment guidelines referred to in paragraph 1 above, will be placed in a Guideline Manual. A copy of the Guideline Manual will be maintained at appropriate outpatient clinic locations, such as B-1 and NRC, and in the hospital.

4. Defendants will develop a plan to provide continuing education programs which focus upon the medical conditions set forth in Part III, paragraph 1, above, and upon recognition and use of the transfer criteria referred to in Part III, paragraph 2, above.

5. Defendants will develop (a) problem lists and (b) flow sheets for each of the medical conditions referred to in Part III, paragraph 1, above, which are approved by the Medical Executive Committee at CMF. These problem lists and flow sheets will be maintained in the medical records of each inmate who suffers from one or more of the medical conditions set forth in Part III, paragraph 1, above.

6. CMF has a Quality Assurance Committee (QA Committee) and program. For purposes of this Consent Decree, the parties agree that the QA program will interface with an appropriate peer review program and that it will include a system of quality assurance for each

medical department at CMF which is part of an overall institutional medical plan for quality assurance. The QA program will include the following:

a. A written program for quality assurance in each medical department at CMF which provides for monitoring and evaluation of clinical services, including quality, timeliness, appropriateness, and resolution of problems;

b. Monitoring and evaluation of the quality, timeliness, and appropriateness of clinical services through the routine collection of information about important aspects of care, periodic assessment of such information to identify problems, and use of identified criteria, as set forth in the applicable institution and departmental QA plans;

c. Documentation of actions taken to resolve and correct identified problems and an evaluation of the effectiveness of corrective actions;

d. Annual reappraisal of the QA program to determine effectiveness; however the parties agree that during the life of this Consent Decree, the QA program shall be appraised quarterly during the first year of its operation to determine its effectiveness, semi-annually during the second year, and annually thereafter.

7. Defendants will appoint a QA Coordinator who is qualified to administer the QA program at CMF.

8. Defendants will retain Quality Healthcare Resources, Inc., or an organization with similar background and expertise, to assist in further development and assessment of a QA program at CMF which covers

inpatient care, hospital-sponsored ambulatory care, physical medicine and rehabilitation care, dental care, and psychiatric care at CMF and NRC. Within ninety (90) days of being retained, the consultant will provide a written report on his initial assessment of the existing QA program, make recommendations for modifications, if necessary, and provide QA education to medical staff. After the initial assessment report, the independent consultant will provide periodic reports which assess the effectiveness of the quality assurance program at CMF on the schedule described in Part III, paragraph 6(d). The consultant will use standards of the JCAHO in assessing and developing the QA program at CMF. The quarterly reports will assess the effectiveness of the QA program with respect to medical, dental, and mental health care of inmates at CMF. The parties agree that assessments of the QA program will include implementation and operation of the treatment guidelines and transfer criteria set forth in Part III, paragraphs 1 and 2, above.

9. CMF has the ability to do arterial blood gases (ABG's) and has purchased and trained staff in the use of peak flow meters. Defendants will review the location and use of this equipment to determine whether it is located and used in the manner most effective for the diagnosis and treatment of inmates with pulmonary function disorders.

10. CMF has a computer based Drug Interaction Profile (DIP) which is available to medical staff to obtain information about possible drug interactions. Defendants will review existing policies and procedures regarding use of the DIP to ensure that it is being used, where medically appropriate, by staff, particularly for patients with one or more of those medical conditions set forth in paragraph 1, above.

11. Defendants will review the existing Medical Officers of the Day (MOD) system at CMF to determine whether additional hours of physician coverage are needed on nights, weekends, or holidays and report on the results.

IV. MEDICAL DISABILITY ISSUES

1. Defendants will develop and implement a plan for organizing existing medical staff and resources into a section of Physical Medicine and Rehabilitation under the Department of Medicine at CMF. The section will include physical medicine, physical therapy, occupational therapy, and psychology. The section of Physical Medicine and Rehabilitation will develop and implement continuing education programs for members of the section.

2. The parties agree that the Physical Medicine and Rehabilitation section of the Department of Medicine at CMF will be covered by the QA program at CMF.

3. Defendants will develop and implement a plan for identifying disabled inmates and the cause of their disability. For purposes of this Consent Decree, "disabled inmate" is defined as an inmate who is mobility-impaired through confinement to a wheelchair or who uses a prosthetic device.

4. Defendants will ensure that a treatment plan for each disabled inmate is developed and that is reviewed periodically. The treatment plan will document among other things whether an inmate has need of training in Activities of Daily Living (ADL). The adequacy of treatment plans, including but not limited to, provision for periodic evaluations of wheelchairs, prostheses, and orthoses and training in their use and the timely provision of such equipment from the date of a physician's order,

will be subject to review through the QA program.

5. Defendants will develop and implement a plan for providing ADL training for inmates who require it and for providing assistance to inmates who cannot perform ADL independently.

6. Defendants will review and prepare a report on the availability of hours of care provided by psychiatrists at CMF to determine whether additional hours of care are needed to meet the current medical needs of inmates who require such services. If defendants determine that additional hours of care are needed, defendants will develop and implement a plan to ensure that sufficient hours of physiatry care are provided to meet the medical needs of inmates who require such care.

7. Defendants will ensure that physical therapy aides provide patient care which is within the scope of applicable professional standards.

8. Defendants will review and prepare a report on the availability of hours of care provided by the physical therapist at CMF to determine whether additional hours of care are needed to meet the current needs of inmates who require such services. If defendants determine that additional hours of care are needed, defendants will develop and implement a plan to ensure that sufficient hours of a physical therapist's time is available to meet the medical needs of inmates who require such services.

9. Defendants will ensure that physical therapy services are available through appropriately trained, certified backup providers whenever CMF is without a full-time physical therapist for a period of time longer than one month.

10. Defendants will ensure that the water temperature of whirlpool and sitz baths is individualized, where a patient's condition requires, and will provide whirlpools and sitz baths with working thermostats.

11. Defendants will provide special mattresses, referred to as egg-crate mattresses, if ordered by a staff physician, to those disabled patients who require them.

12. Defendants will ensure that inmates with complete spinal cord lesions above the T6 level and who are referred for housing in an air-conditioned unit by a staff physician order are housed in such a unit unless the patient refuses placement there, and the refusal is documented appropriately in the inmate's medical record.

13. Defendants will ensure that disabled inmates with mobility impairments at CMF are housed in a wheelchair-accessible environment, unless the patient refuses the offer of placement in such an environment, and the refusal is documented in the inmate's medical record.

14. Defendants will perform an access survey of the housing and program areas at CMF with the assistance of an independent consultant who has appropriate background and expertise in order to evaluate the accessibility of those areas to disabled inmates. The Consultant will provide a written report and make written recommendations. Copies of the report and recommendations will be provided to the Mediator and plaintiffs' counsel. Upon evaluation of the results of the access survey, defendants will develop a plan within ninety (90) days to ensure that disabled inmates have meaningful access to housing and program areas, including beds, toilet facilities, showers, lavatories, mirrors, water fountains, exercise yards, and the gymnasium. Such access will be

periodically evaluated and reported on to the Mediator.

15. Defendants will develop a plan to ensure that reasonable accommodations are made so that disabled inmates have equivalent access to package pickup, canteen, and laundry services.

16. Defendants will ensure that disabled inmates who are otherwise qualified will have the opportunity to participate in work, exercise, educational, and vocational programs available at CMF, consistent with the requirements of section 504. A disabled inmate will not be deemed unqualified to participate because he is physically unable to participate for a full work day or because access to the program area requires that the inmate be searched.

17. Defendants shall review the existing prerelease program for disabled inmates to determine whether it provides them with appropriate information and assistance to meet the special needs of those inmates following release and report on the results.

V. MENTAL HEALTH ISSUES

A. SUICIDE

1. Defendants agree to provide appropriate suicide prevention programs at CMF.

2. Defendants shall develop a plan by March 31, 1990 regarding suicide prevention programs at CMF. The plan will address the following issues:

a. Training of medical, custodial and psychiatric staff;

b. Inclusion in orientation programs of materials concerning suicide prevention;

c. Review of current policies and practices concerning the use of 5-point restraints, isolation and strip cells;

d. Programs for identification, counseling, treatment and hospitalization of prisoners at risk for suicide, including those prisoners believed by a psychiatrist or psychologist to be serious suicide risks who are not admitted to the DMH Unit;

e. Reporting of suicide attempts, suicidal expressions and suicidal gestures to prison officials and psychiatric staff;

f. Appropriate housing for suicide risk prisoners.

3. Defendants shall prepare a report to the Mediator which sets forth defendants' plan to address any identified deficiencies in the suicide prevention program including dates for implementation of any new programs (no later than July 31, 1990).

4. Defendants will report to the Mediator periodically the following information:

a. For each prisoner that commits suicide, the following information: name, CDC number, housing unit, classification, and copies of incident reports concerning death, autopsy and coroner's report, death certificate, central, psychiatric and medical file for last three months;

b. Monthly statistics showing the number of suicide attempts; the name, housing unit and classification of each prisoner attempting suicide; incident reports on attempted suicides.

B. PSYCHIATRIC OFFICER OF THE DAY

1. There shall be a psychiatrist present at CMF at all times.

2. Defendants shall evaluate by March 31, 1990 whether Psychiatric Officer of the Day (POD) coverage by one psychiatrist provides adequate and appropriate psychiatric care for the existing prisoner population. The evaluation will address the adequacy of the psychiatric care provided to prisoners at CMF and NRC during POD hours.

3. The results of defendants' evaluation shall be set forth in a written report, to be submitted to the Mediator. The report will contain defendants' plan to address any identified deficiencies in the POD program, including dates for implementation of any new program (no later than July 31, 1990).

C. HIRING AND RETENTION OF PROFESSIONAL STAFF

1. Defendants shall evaluate and report to the Mediator, by not later than March 31, 1990, regarding all issues affecting the hiring and retention of professional staff necessary to provide psychiatric care. The report will contain defendants' plans, if any, to address the problems of hiring and retaining the professional staff necessary to provide psychiatric care and dates for implementation of the plans.

2. Defendants will report to the Mediator periodically information sufficient to show their level of mental health staffing on a monthly basis including information concerning contract staff.

3. Beginning March 31, 1990, at least seventy-five percent (75%) of all budgeted mental health positions must be filled, on average, within 6 months after establishment of the positions over any six month period.

D. TASERS, RESTRAINTS AND INVOLUNTARY MEDICATION

1. Tasers will not be used to restrain a prisoner to administer involuntary medication.

2. Defendants shall revise by March 31, 1990 their written policies to limit, to the greatest extent possible, the use of Tasers on prisoners with psychiatric classifications or any other prisoner taking antipsychotic medications. Defendants shall report their revisions to the Mediator. Defendants' policies must provide for the following:

a. Custodial staff must confer with a psychiatrist regarding the use of the Taser and such consultation shall be appropriately documented except in an emergency;

b. The use of a Taser is a last resort. Alternative means of addressing the situation must be considered and the reasons for their rejection stated in writing;

3. Defendants shall provide to the Mediator periodically incident reports, including the record

of the psychiatric consultation, concerning each use of the Taser on prisoners with psychiatric classifications.

4. Defendants shall evaluate and report to the Mediator regarding their procedures and practices for the administration of involuntary psychotropic medication in the outpatient units.

E. INPATIENT CARE

1. Defendants will provide appropriate access to inpatient psychiatric care for all prisoners at CMF.

2. Defendants will evaluate by March 31, 1990 the following issues concerning inpatient psychiatric care:

a. The utilization of existing inpatient beds at CMF and Atascadero State Hospital (ASH);

b. The appropriateness and operation of the stated admission criteria and exclusionary criteria for the DMH Unit at CMF and ASH including inpatient care for prisoners who refuse medication, for prisoners who are violent, for prisoners with a history of disciplinary problems, for prisoners with chronic mental illness, for prisoners with suicidal tendencies, for prisoners with HIV seropositivity, ARC or AIDS;

c. The operation of the CAT teams.

3. The results of defendants' evaluation will be set forth in a written report, to be submitted to the Mediator. The report will also contain defendants' plans

to address any identified problems and dates for implementation of any plan (no later than May 31, 1990).

4. Defendants will work through the organized medical staff to develop a program for providing privileges to appropriate CMF medical staff to admit patients to the DMH Unit. The program will be implemented by March 1, 1990.

5. Defendants' periodic reports will contain information concerning the monthly utilization of inpatient beds at CMF and ASH, as well as referrals and rejections by those programs and copies of the CAT team referral/rejection reports.

F. THE PROVISION OF APPROPRIATE PSYCHIATRIC CARE TO ALL PRISONERS AT CMF

1. Defendants will provide appropriate psychiatric screening for each incoming inmate at CMF and will provide appropriate psychiatric evaluation and treatment for all inmates at CMF as medically indicated.

2. Defendants will prepare and implement a program, to be operational by June 30, 1990, to provide appropriate psychiatric care for prisoners discharged from the inpatient psychiatric programs at CMF and ASH. The outpatient program as implemented will address the following elements:

a. Reducing regression as much as possible by providing appropriate programming and therapies;

b. Providing therapeutic

programs designed to facilitate increased functioning, participation in prison programming and return to the general population;

c. Appropriate monitoring of medications;

d. Communication and consultation between inpatient and outpatient psychiatric staff.

3. Defendants will improve outpatient psychiatric services. The program will be implemented in phases. An interim program will be in effect by June 30, 1990. Defendants will provide periodic reports to the Mediator concerning the program and its implementation. The program will be staffed and fully operational by October 31, 1990. The outpatient program will address the following issues:

a. Staffing levels for psychiatrists, psychologists, social workers, recreational and occupational therapists, nursing staff and custodial staff will be sufficient to provide appropriate access to psychiatric evaluation and treatment programs for all prisoners at CMF requiring such programs;

b. The need for additional staff will be periodically assessed based on the needs of the population of CMF, and defendants will request such funding for additional staffing pursuant to the budgetary processes;

c. Treatment plans will be developed for all prisoners at CMF receiving psychiatric care. Such plans shall be reviewed and revised at

appropriate intervals commensurate with the level of psychiatric care required by the patient;

d. Each prisoner referred to CMF from another institution (or from another unit within CMF) for psychiatric evaluation or treatment shall be examined and evaluated by a member of the clinical staff within 24 hours of his arrival at CMF and provided with appropriate treatment. A treatment plan for each such prisoner will be prepared by the treatment team within ten days of assignment to a treatment level;

e. Appropriate space and facilities for treatment programs will be provided;

f. Appropriate access to psychiatrists and other mental health professionals will be provided to all prisoners based on their needs. The special psychiatric needs of prisoners diagnosed with HIV shall be addressed. All prisoners receiving psychotropic medications will be seen by a psychiatrist at appropriate intervals;

g. Medications will be appropriately monitored and appropriate medical records and charts will be maintained;

h. Each prisoner request to see a psychiatrist or psychologist will be documented in writing and responded to appropriately.

i. Isolation and seclusion in their cells of prisoners in need of psychiatric care will be minimized.

4. In an effort to comply with

paragraphs 2 and 3 above, defendants will implement their Outpatient Program Guide.

5. Defendants will evaluate their program for providing psychiatric evaluation and treatment in October of 1990 and report to the Mediator by December 15, 1990. The Mediator, if necessary, will independent investigate the program, in the determination of the adequacy of defendants' program for providing appropriate psychiatric services.

G. CLASSIFICATION, HOUSING, MANAGEMENT

1. No prisoner shall be "declassified" from any psychiatric classification without a statement in writing from a psychiatrist, made after a psychiatric evaluation including an interview, recommending the declassification. If a psychiatrist recommends that an inmate be declassified, the prisoner's case manager or treatment team shall describe the need for further treatment, if any. The declassification recommendation will then be forwarded to the Classification Committee for its recommendation for appropriate placement of the prisoner.

Defendants shall develop written standards and procedures for declassification of prisoners and submit a report by March 31, 1990. Defendants shall provide to the Mediator periodically a copy of the decisions of the Classification Committee and any supporting documents in 25% of the cases in which a prisoner is declassified from Categories J or K. The reporting rate may be adjusted by the Mediator. Defendants shall report periodically the total number of prisoners declassified from Categories J and K.

2. All classification procedures, housing decisions and disciplinary actions concerning prisoners with psychiatric classifications must consider the existing psychiatric treatment plan for the prisoner. Defendants shall develop and implement appropriate written rules and procedures by March 31, 1990.

3. Defendants will evaluate whether and under what circumstances it is appropriate to house prisoners with psychiatric classifications in Willis Unit. Defendants will prepare and implement a pilot program by June 30, 1990 regarding the housing of inmates with psychiatric classifications in Willis Unit. Defendants will evaluate and report on the program and the housing of prisoners in psychiatric classifications in Willis Unit by December 15, 1990. The Mediator, if necessary, will conduct an independent investigation. The program will, at a minimum, address the following issues:

a. Prisoners with psychiatric classifications may not be placed in Willis Unit without prior approval of a clinician absent an emergency. If the clinician approving the referral is not a member of the prisoner's existing treatment team, he or she must consult after placement with a member of that team. In an emergency a prisoner with a psychiatric classification may be placed in Willis Unit without the prior approval of a clinician provided that the prisoner is examined and approved for such placement by a clinician within 24 hours after the placement. If the clinician does not approve the emergency placement, custody staff may request that the case by reviewed jointly by the Chief Psychiatrist and Associate Warden. The case must normally be reviewed within 24 hours. If the case is not resolved by the Chief Psychiatrist and Associate Warden, it may be referred to the Chief Deputy Warden for Clinical Services and the

Chief Deputy Warden for Operations. The case must normally be reviewed and a written decision made within 24 hours. Any written decision of the chief deputy wardens concerning the review of a decision to place a particular prisoner in Willis Unit will be produced periodically to the Mediator.

The program shall set forth the factors to be considered by the clinician in assessing the appropriateness of housing the inmate in Willis Unit and the narrow circumstances justifying an emergency placement without the prior approval of a clinician.

b. Prisoners in psychiatric treatment categories who are housed in Willis Unit shall receive adequate psychiatric care. The program shall set forth the types and levels of staffing and the psychiatric programs which will be available to prisoners in psychiatric treatment categories in Willis Unit.

c. To the maximum extent possible prisoners in psychiatric treatment categories who are housed in Willis Unit shall be housed separately from other prisoners in that unit.

d. All prisoners with psychiatric classifications housed in Willis Unit as of the date the Consent Decree is filed will be examined individually by a clinician within thirty (30) days concerning the appropriateness of their continued housing in Willis Unit. Such evaluation shall consider the availability of psychiatric treatment in Willis Unit at the time of the examination. Defendants shall report to the mediator the decision reached as to each such prisoner, including a copy of the results of the psychiatric examination. If the clinician does not approve the continued placement, custody staff may

request that the case by reviewed jointly by the Chief Psychiatrist and Associate Warden. The case must normally be reviewed within 24 hours. If the case is not resolved by the Chief Psychiatrist and Associate Warden, it may be referred to the Chief Deputy Warden for Clinical Services and the Chief Deputy Warden for Operations. The case must normally be reviewed and a written decision made within 24 hours. Any written decision of the chief deputy wardens concerning the review of a decision to continue the placement a particular prisoner in Willis Unit will be produced periodically to the Mediator.

VI. AIDS

1. Within 120 days of the effective date of this agreement, defendants will in good faith develop and begin implementation of a pilot program to determine the feasibility of placing HIV seropositive inmates in a general population program at CMF. It is the goal of the pilot program to demonstrate that such placement is possible consistent with medical, behavioral, and security considerations.

2. Screening the HIV seropositive inmates for placement in a general population program at CMF during the pilot program will be done on a case-by-case basis through the pilot program's selection criteria. These selection criteria shall not be binding on any future program. The pilot program's selection criteria will include the following:

a. Classification score generally not to exceed that of indicated placement in Level III facilities;

b. No documented recent history

of assaultive behavior;

c. No documented recent history of sexual behavior of a kind that poses a risk of transmission of the HIV virus;

d. No documented recent intravenous drug use or possession of intravenous drug paraphernalia;

e. No documented recent history of propensity to prey or be preyed upon;

f. Medical condition as determined by medical and/or psychiatric staff must be commensurate with placement;

g. An inmate's preference for being housed in SPU or in a general population program will be considered.

3. During the pilot program, selected HIV seropositive inmates will be placed in a general population program of defendants' design at CMF. These inmates will be drawn from inmates presently housed in the SPU and newly-discovered HIV seropositive inmates coming into or identified within CMF. Inmates placed in the general population program during the pilot program at CMF will be assigned to a single open housing unit. It is anticipated that between 20 and 30 inmates will be placed in a general population program during the first three months of the program's operation. Additional numbers of inmates may be added to the pilot program by defendants.

4. The pilot program will be evaluated by defendants after nine (9) months of the effective date of

this agreement. Defendants will prepare a report for submission to the Mediator within eleven (11) months of the effective date of this agreement. The report will address, among other things:

a. The relative success of the pilot program;

b. Participation of HIV seropositive inmates in jobs, programs, and activities at CMF during the pilot program;

c. Plans for future placement of HIV seropositive inmates at CMF, including disbursement in general population;

d. Plans for future availability of programming for HIV seropositive inmates at CMF;

5. Defendants will continue to make AIDS education classes available to inmates at CMF on a regular basis as long as there is continuing interest among the inmate population. At a minimum, defendants will offer such classes at least once every 6 months regardless of inmate interest or attendance. Defendants will submit a report to the Mediator describing and evaluating the AIDS education program at CMF. This report will be submitted at approximately the same time as the report described in paragraph 4.

6. Defendants will maintain the confidentiality of inmates' HIV seropositive status as provided for by law.

VII. GENERAL CONDITIONS ISSUES

A. LAW LIBRARY

Within ninety (90) days of the filing of an order approving this Consent Decree, defendants will develop and implement an adequate plan to provide reasonable physical access to the law library to all inmates in closed units, including Administrative Segregation, the Psychiatric Management Unit, and the Special Program Unit, or those who are confined to their cells for more than ten (10) days. The plan shall include physical access to the law library for all inmates who are not otherwise able to get physical access to the library for more than ten (10) days because they are on Cell Feed and Lock-Up, are confined-to-quarters or are in the Disciplinary and Detention Cells.

B. HOUSING ASSIGNMENTS

Defendants shall maintain housing assignment policies and practices at CMF that are designed to minimize violence and that take into account inmate safety and the needs of an inmate with respect to any disabilities and medical or mental health care. Defendants shall conduct a review of the existing housing assignment policies and practices at CMF and submit a report to the Mediator and plaintiffs regarding the adequacy of those policies and practices to satisfy the considerations set forth above. At plaintiffs' request, the Mediator, in evaluating the report, may investigate, among other things, defendants' mixing of security and custody levels and the use of overrides in making housing assignments.

C. DOUBLE CELLING

1. Defendants shall not double cell any inmate whose medical or psychiatric condition or physical disability requires a single cell.

2. Defendants shall not involuntarily double cell reception center inmates in any pocket cell unless all of the following conditions are satisfied:

a. Defendants shall make every reasonable effort to maximize out-of-cell time, but in no event shall inmates be locked in their cells more than twelve (12) hours per day;

b. Inmates are not housed in a pocket cell for more than sixty (60) calendar days;

c. After orientation, inmates are provided with the opportunity to engage in adequate indoor and outdoor recreational activities at least five (5) hours per day, five (5) days per week.

D. INMATE CLERKS

Defendants shall review the policies and practices by which inmate clerks are permitted access to information concerning other inmates. Defendants shall submit a report to the Mediator and recommend any changes in policies and practices as necessary to prohibit access to information which may reasonably be expected to threaten the safety or security of any other inmate or staff member.

E. DISCIPLINARY AND DETENTION CELLS

Defendants shall review all policies and procedures and practices for placement and retention of any inmates in the Disciplinary and Detention Cells of the administrative segregation unit and the conditions of confinement and treatment of inmates in such cells. Defendants shall ensure that their written policies contain specific criteria for placing an inmate in such cells. Inmates with serious mental illness or a recent history of attempted suicide, as determined by a psychiatrist, psychologist, or physician, shall not be housed in these cells. Defendants shall not house inmates in these cells for longer than ten (10) full consecutive calendar days.

Defendants shall not place any inmate in the Disciplinary and Detention cells unless:

1. There is good cause for such placement and such cause is adequately documented;

2. Within twenty-four (24) hours of confinement, a psychiatrist, psychologist, or physician examines the inmate and determines that this housing will not jeopardize the inmate's mental well-being;

3. A psychiatrist, psychologist, or physician examines the inmate once every 72 hours and determines that this housing is not jeopardizing the inmate's mental well-being;

4. The flaps are not closed in the absence of good cause and that cause shall be documented. Good cause shall include, but not be limited to, throwing any material at a staff member or inmate. No officer

below the rank of lieutenant shall determine whether there is good cause. The flaps may not be closed for more than the time necessary to deter the inmate from committing similar misbehavior, and the need for such deterrent action shall be assessed and documented at least every twenty-four (24) hours.

5. Within sixty (60) days, defendants shall take all reasonable steps to modify the plumbing to provide that inmates shall be able to flush their toilets at will, except when an inmate floods his cell or otherwise abuses the toilet facilities. When control of the toilets is taken away from an inmate the reasons therefor shall be documented and the toilet shall be flushed at least once every hour.

6. The cells shall be kept in a clean and sanitary condition. Defendants shall ensure that upon entering these cells each inmate has or is furnished with supplied sufficient to maintain personal hygiene.

7. Each cell shall be equipped with an adequate means of artificial illumination. Within sixty (60) days, defendants shall take all reasonable steps to modify electrical switches to provide that lights inside the cell shall be connected to a functioning on-off switch that is under the control of the occupant.

8. Each inmate shall be provided with a paper garbage bag each day.

F. TOILETS, SHOWERS, AND SINKS

Defendants shall evaluate the facilities at CMF regarding the adequacy of existing toilets, showers and sinks for each unit, and sub-unit, including individual

dormitories and submit a report to the Mediator for providing additional facilities on a unit by unit basis. The Mediator shall review this report and determine whether the facility or proposed facilities for each unit are adequate. When reviewing the adequacy of the facilities, the Mediator may consider published standards, including but not limited to those of the American Correctional Association and the American Public Health Association. The parties recognize that such standards do not by themselves establish constitutional standards under the Eighth Amendment.

G. EXERCISE

Defendants shall review all policies, procedures and practices for providing outdoor exercise to all inmates in closed units, including, but not limited to, Willis Unit and the Psychiatric Management Unit. Defendants shall submit a report and proposal to the Mediator for providing every inmate with a minimum of ten (10) hours of outdoor exercise per week. Defendants may suspend exercise for an inmate for no more than ten (10) days if the suspension is based upon genuine reasons of discipline or the safety and security of the prison. The opportunity for outdoor exercises may be curtailed for any period medically indicated upon the order of a physician which shall be appropriately documented.

H. EMERGENCY PROCEDURES

Defendants shall review their existing policies and practices for removing an inmate in a Willis Unit cell during the first watch. Defendants shall submit a report to the Mediator and recommend any revision in their policies, procedures and practices which are necessary to assure that an inmate may be removed from his cell promptly upon discovery that an emergency exists and

consistent with safety and security.

I. STAFFING

Defendants shall review the staffing levels of each unit at CMF to determine whether there are adequate custody staff to properly supervise and to provide escorts and other services to inmates in those units. Defendants shall submit a report of their conclusions and any recommendations to the Mediator and plaintiffs' counsel.

J. CONVERTING SPACE FOR HOUSING

Defendants shall not convert any space at CMF that did not house inmates as of November 1, 1989 to a housing unit, unless all of the following conditions are satisfied:

1. Except in cases of emergency, defendants shall provide notice to the Mediator and plaintiffs of their intention to convert space for housing as soon as reasonably possible, but not less than thirty (30) days before inmates are housed in the space to be converted; and

2. At the request of plaintiffs, the Mediator may immediately determine the impact of the conversion. The Mediator may not recommend to the Court that the conversion be prohibited, unless he or she finds that the conversion will itself violate the Eighth Amendment standards. He or she, however, may determine that the conversion will make defendants unable to meet their obligations under the Consent Decree and may recommend appropriate remedies to the Court.

VIII. CONSTRUCTION AND IMPLEMENTATION

In construing and implementing the terms of this Consent Decree, the parties agree to the following:

1. If defendants seek to modify any plans or programs required by this Consent Decree, they shall serve a copy of the proposed modification on plaintiffs and the Mediator. The plaintiffs shall have thirty (30) days from receipt of the proposed modification in which to file with the Mediator a response to the proposed modification. If plaintiffs object to the modification sought, the parties shall meet or otherwise confer in a good faith effort to resolve their differences concerning the proposed modification. If the parties are unable to resolve their differences through the meet-and-confer process, the proposed modification will be referred to the Mediator for findings and recommendations. Defendants shall have the burden of persuasion that the proposed modification should be approved. Any proposed modification to which plaintiffs do not object within thirty (30) days of receipt shall be deemed approved. These provisions for modifications do not govern the provisions for emergency suspensions or modifications described in Part VIII, paragraph 2, below.

2. It is not the intent of this Consent Decree to prohibit nor does it prohibit the Director or Warden from temporarily suspending compliance with all or any part of this Consent Decree during a state of riot or turmoil or other genuine emergency. The determination by the Director or Warden that a state of genuine emergency exists shall be set forth in writing as soon as reasonably possible, shall detail briefly with reasonable specificity the reasons for the determination, shall promptly be provided to the Mediator and plaintiff's counsel and shall be subject

to the mediation and enforcement process provided for herein.

3. Defendants promptly shall provide a copy of the Consent Decree to each of their employees and agents who works now or in the future at the institution or who now or in the future has any management responsibility for operations, policies and procedures for or at the institution. Notice to the class of the provisions of the Consent Decree will issue pursuant to notice provisions approved by the Court. If the parties to the Consent Decree cannot agree on the provisions for notice to the class, each party shall promptly submit their proposals to the Court for its determination.

4. Except as expressly stated in this Consent Decree, plaintiffs' counsel shall timely be provided by defendants with copies of all reports, plans, proposals, policies and procedures, and other materials that the defendants are obligated to produce or provide under the Consent Decree. On reasonable notice and for good cause, the Mediator may provide that plaintiffs' counsel shall have reasonable access to other documents, and to defendants' employees and agents and to areas of the institution relevant to this Consent Decree.

5. If additional funding is necessary for timely implementation of any of defendants' obligations, the defendants shall employ every lawful means at their disposal to secure such funding. Any failure, however, timely to secure such funding shall not relieve the defendants of their obligations under the Consent Decree, and the Court may employ whatever means is lawfully available to it to compel timely implementation, consistent with the other terms of the Consent Decree.

6. No person who has notice of this Consent Decree shall fail to comply with the letter and spirit hereof nor shall any person subvert the letter or spirit hereof by any sham, indirection, or other artifice.

7. Unless otherwise provided for by this Consent Decree any dispute between the parties arising under this Consent Decree shall be resolved through the mediation and compliance procedures set forth in Part IX of this Consent Decree.

8. Unless otherwise specifically set forth in this Consent Decree, defendants will provide plaintiffs and the Mediator with copies of any reports provided for by this Consent Decree within 120 days from the date the order approving the decree is filed, or at such later time as is agreed on by the parties or ordered by the Court. Any plans required by this Consent Decree shall specify a date on which implementation of the plan shall commence.

9. All medical staff committee minutes, which are confidential and privileged from disclosure under applicable law, will be made available to the independent consultant on QA programs described in this Consent Decree in order to carry out his or her duties under the decree. The independent QA consultant shall also be permitted to attend medical staff committee hearings. At the request of plaintiffs, the Mediator may designate a physician selected by him or her who shall be permitted to review the medical staff committee minutes and attend meetings. Access to medical staff committee meetings or minutes by the QA consultant or a physician designated by the Mediator shall be pursuant to the bylaws of the CMF Medical Staff regarding courtesy privileges for nonstaff physicians. If such courtesy privileges are denied, the denial shall be subject to the mediation process. For good

cause shown, plaintiffs' counsel may request copies of the medical staff committee minutes from the Mediator. Such a request will be subject to the mediation process. Disclosure pursuant to the terms of this Consent Decree shall not operate as a waiver of any claim of privilege in this or any other action.

IX. MEDIATION AND COMPLIANCE

1. A person who is mutually agreeable to the parties will be appointed by the Court to serve as Mediator. The parties shall promptly meet and confer and seek to agree on a qualified candidate. If within thirty (30) days after this Consent Decree is entered by order of the Court, the parties have not agreed on the person who shall be Mediator, each side shall nominate no more than three candidates for appointment. Within ten (10) days of submission, each side may veto one candidate on the other side's list. The remaining candidates shall be submitted to the Court with their resumes and brief descriptions of their qualifications. Among the criteria the Court will consider relevant in making its designation are the candidates' expertise in the fields of correctional administration, health care and mediation. Within twenty (20) days of these submissions to the Court, the Court shall select and appoint as Mediator one of the candidates submitted by the parties, or such other person as the Court shall find has sufficient expertise in mediation, correctional administration and correctional health care. If the Court selects as the Mediator a person who is not proposed by a party, the Court shall allow the parties fifteen (15) days in which to make written objections to the Court's selection. Promptly thereafter, the Court will appoint that person or submit to the parties a new candidate for their comment.

2. The Mediator shall have the following

powers and duties:

a. Work with the parties to develop plans of implementation or reports required by the provisions of this Consent Decree;

b. Work with the parties to resolve disagreements over the adequacy of plans of implementation or reports that defendants are required to prepare under this Consent Decree;

c. Make written findings and recommendations to the Court regarding disputes over the adequacy of plans of implementation or reports that were not resolved through mediation;

d. Receive periodic compliance reports from defendants that set forth information regarding and progress toward implementation of the terms of this Consent Decree. The format of these compliance reports is within the discretion of defendants. The Mediator may require that additional information be included in these reports, and that changes be made in format;

e. Provide the Court and the parties with a written report at least every ninety (90) days during the first year of this Consent Decree concerning the status of implementation of the provisions of the decree, and then at least every 180 days thereafter during the life of the Consent Decree. All such reviews and reports shall address whether any changes in circumstances have affected the defendants' ability to provide the medical, psychiatric or custodial care provided for by this Consent Decree;

f. Provide for appropriate notices to the class members and appropriate employees and agents

of the defendants;

g. Perform such other duties as the parties may agree to assign.

3. Except as specifically provided herein, the Mediator shall have access to all parts of the institution with or without notice, all relevant documents, persons, and institutional meetings and proceedings to the extent that all such access is needed to fulfill his or her obligations under the Consent Decree and may retain experts for his or her consultation in those subject areas covered by the provisions of this Consent Decree.

4. When plaintiffs have reason to believe that the provisions of this Consent Decree are not being properly implemented, plaintiffs' counsel shall notify defendants by telephone and in writing of the perceived violations, as well as their basis in law and fact. A copy of the written notice will be sent to the Mediator. Defendants shall respond in writing to plaintiffs and the Mediator within 10 working days of receipt of the written notification. If the parties are unable promptly to resolve their differences, the Mediator shall be notified by plaintiffs' counsel in writing.

5. Upon his or her appointment the Mediator shall promptly establish a general schedule and procedure for the dispute resolution process provided for herein. Such processes are to be concluded with issuance by the Mediator of his or her final report, if such become necessary, no later than 45 days from receipt of the written notice described in Part IX, paragraph 4, above, unless the time is extended by the Mediator for good cause.

6. The reports and recommendations of

the Mediator shall be filed with the Court and served on the parties and shall be based on provisions of this Consent Decree and/or applicable law. The Mediator's report shall be final and binding on the parties as if entered in fact by the Court unless, within 15 working days of filing, a party files objections with the Court in the form of a noticed motion. If objections to the Mediator's report and recommendations are filed, the Court shall consider the matter de novo and issue an appropriate order regarding compliance. Any evidence not previously presented to the Mediator in the course of the proceedings described in Part IX, paragraphs 4 and 5 will be admitted at a hearing before the Court only upon a showing that the party offering it lacked a reasonable opportunity to present the evidence to the Mediator. The burden of persuasion is on the party who has objected to the Mediator's findings and recommendations.

7. Following a finding of noncompliance with the Consent Decree by the Court, defendants shall have thirty (30) calendar days to comply with the provisions of the order of compliance. This 30-day period may be extended by the Court where defendants show to the Court that compliance is not reasonably possible within this 30-day period. If the 30-day period is extended, the Court shall fix a date by which compliance shall be required. Defendants shall notify the Court, the Mediator and plaintiffs in writing when compliance is accomplished.

8. After first informing the Mediator and defendants in writing and only in extraordinary circumstances, plaintiffs may apply directly to the Court for emergency relief on the grounds that compliance with the mediation process would lead to immediate irreparable harm to class members.

9. In the event the Mediator becomes permanently unavailable due to death or other unforeseen circumstances, a new Mediator shall be selected in the same manner as provided for the selection of his or her predecessor.

X. TERMINATION OF THE DECREE

1. The Court shall retain jurisdiction of this action for all purposes under this Consent Decree until defendants shall have fully and faithfully implemented its provisions and until the judgment is discharged.

2. It is the goal of the parties that the provisions of this Consent Decree shall be fully and faithfully implemented in their entirety within twenty-four (24) months from the date an order approving the Consent Decree is filed.

3. On or after a date on which defendants have fully and faithfully implemented any provision of this Consent Decree, the defendants may request that the Mediator may certify compliance with that provision and may make appropriate modifications in defendants' reporting obligations under this Consent Decree.

4. On or after the date on which the Mediator certifies that defendants have fully and faithfully implemented the provisions of this Consent Decree in their entirety and have been in substantial compliance with the Consent Decree for no less than one year, defendants may move that the injunction entered herein be dissolved, the judgment discharged, jurisdiction terminated, and the case closed and dismissed with prejudice on the grounds that defendants have fully and faithfully implemented and

maintained the provisions of the Consent Decree; provided that no such motion may be filed prior to 36 months from the date an order approving this Consent Decree is filed.

5. Dismissal shall be granted unless, within thirty (30) days after receipt of defendants' motion, plaintiffs file opposition. If such opposition is filed, the Court shall hold a hearing on the motion, and the burden will be on plaintiffs to demonstrate that the defendants have not fully and faithfully implemented all provisions of this Consent Decree. If plaintiffs fail to meet this burden, the injunction shall be dissolved, the judgment shall be discharged, jurisdiction shall be terminated, and the case shall be closed and dismissed with prejudice.

XI. COSTS AND FEES

1. Plaintiffs may seek to recover reasonable costs and attorneys' fees and other expenses that may be sought pursuant to 42 U.S.C. section 1988 and 29 U.S.C. Section 794(b) for work performed in this matter prior to entry of this Consent Decree and reasonably performed during the pendency of this Consent Decree. Reasonable costs and expenses shall be awarded in amounts agreed to by the parties or, absent agreement, as determined by the Court upon plaintiffs' noticed motions.

2. Defendants shall pay the Mediator his reasonable fees and expenses, including the reasonable fees and expenses of any experts or consultants he or she hires pursuant to Part IX, paragraph 3. The rate and procedure for compensation shall be determined by the Mediator and defendants. In the event they are unable to agree, the matter shall be presented to the Court for adoption of a compensation rate and procedure.

CONSENTED TO BY THE UNDERSIGNED:
FOR THE DEFENDANTS
BY:

/s/ James Rowland
JAMES ROWLAND
Director
Department of Corrections

/s/ Eddie Ylst
EDDIE YLST
Warden
California Medical Facility

/s/ Dr. Nadim Khoury
DR. NADIM KHOURY
Assistant Deputy Director
Health Services
Department of Corrections

/s/ Kenneth Shepard, M.D.
KENNETH SHEPARD, M.D.
Chief Deputy Director
Clinical Services
California Medical Facility

/s/ Daniel E. Thor, M.D.
DANIEL E. THOR, M.D.
Chief Physician and Surgeon
California Medical Facility

/s/ Paul Morentz, M.D.
PAUL MORENTZ, M.D.
Chief Psychiatrist
Outpatient Psychiatric Program
California Medical Facility

/s/ Bruce Baker, M.D.
BRUCE BAKER, M.D.
Chief Psychiatrist (Acting)
Northern Reception Center

/s/ Douglas G. Arnold
DOUGLAS G. ARNOLD
Director (Acting)
Department of Mental Health

/s/ Clyde Murrey
CLYDE MURREY
Deputy Director for State Hospitals
Department of Mental Health

/s/ Sylvia Blount
SYLVIA BLOUNT
Executive Director
DMH - Vacaville Psychiatric Program
Department of Mental Health

JOHN K. VAN DE KAMP
Attorney General
of the State of California

By:

/s/ James B. Cuneo
JAMES B. CUNEO
Deputy Attorney General
Attorney for Defendants

/s/ James E. Flynn
JAMES E. FLYNN
Deputy Attorney General
Attorney for Defendants

FOR THE PLAINTIFFS
BY:

/s/ Warren E. George
WARREN E. GEORGE
McCutchen, Doyle, Brown
& Enersen

/s/ Cynthia Greco Herr
CYNTHIA GRECO HERR
McCutchen, Doyle, Brown
& Enersen

/s/ Michael W. Bien
MICHAEL W. BIEN
Brobeck, Phleger & Harrison

/s/ Donald Specter
DONALD SPECTER
Prison Law Office

FOR THE HIV SUBCLASS

BY:

/s/ Sanford Jay Rosen
SANFORD JAY ROSEN
Rosen & Phillips

/s/ Matthew A. Coles
MATTHEW A. COLES
ACLU Foundation
of Northern California

WHEREFORE, the parties to this action having agreed to the provisions of the Consent Decree set forth above, and the Court being advised in the premises, this Consent Decree is hereby entered as the JUDGMENT of this Court.

IT IS SO ORDERED, this _____ day of _____, 1989 at Sacramento, California.

_____
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JAY LEE GATES, et al.,	)	
	)	
Plaintiffs,	)	No. CIV
	)	S-87-1636
v.	)	LKK
	)	
GEORGE DEUKMEJIAN, et al.	)	
	)	
Defendants.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. CIV
	)	S-89-1233
v.	)	LKK
	)	
STATE OF CALIFORNIA, et al.	)	
	)	Filed
Defendants.	)	March 8, 1990
	)	

ORDER

The above-entitled cases are before the court for disposition of proposed consent decrees. Each action concerns conditions of confinement at the California Medical Facility at Vacaville. The matter was referred to United States Magistrate John F. Moulds pursuant to U.S.C. § 636(b)(1)(B) and Local General Order No. 189.

On February 21, 1990, the magistrate filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within ten (10) days. On March 2, 1990, defendants filed timely objections to the findings and recommendations; on March 6 1990, plaintiffs filed objections to the findings and recommendations with regard to United States v. California, No. CIV S-89-1233 LKK.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 305, this court has conducted a de novo review of these cases. Having carefully reviewed the files, the court finds the magistrate's findings and recommendations to be supported by the record and by proper analysis. Pursuant to defendants' objections, those findings are clarified to exclude the Northern Reception Center from the decree entered in United States v. California.

Accordingly, IT IS HEREBY ORDERED that:

1. The Magistrate's Findings and Recommendations filed February 21, 1990 are adopted in full.

2. The consent decrees lodged in the above-entitled actions are approved. All further proceedings shall be conducted before the undersigned.

DATED: March 8, 1990

/s/ Lawrence K. Karlton
UNITED STATES
DISTRICT JUDGE